APPENDIX A

(R. 27, 28)

Order of the Commission entered July 12, 1926

No. 16697

The Chicago, Rock Island & Pacific Railway Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, and St. Louis-San Francisco Railway Company

v.

The Baltimore and Ohio Railroad Company and numerous other railroad companies including the appellants

This case being at issue, upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed report containing its finding of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 12, 1926, and thereafter to abstain from the practice of requiring the above-named complainants, together with the

Chicago, Burlington & Quincy Railroad Company and the Wabash Railway Company, to bear the charges for transfer services from East St. Louis, Ill., to St. Louis, Mo., on westbound freight traffic passing through both points on combination rates which are the same on St. Louis as on East St. Louis.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 12, 1926, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of westbound freight traffic passing through both East St. Louis, Ill., and St. Louis, Mo., on combination rates which are the same on St. Louis as on East St. Louis, and delivered to complainants, or the Chicago, Burlington & Quincy Railroad Company or the Wabash Railway Company, the practice of bearing or absorbing on such traffic the charges for transfer services from defendants' lines in East St. Louis, Ill., to the lines of complainants, or of the Chicago, Burlington & Quincy Railroad Company or the Wabash Railway Company in St. Louis, Mo.

And it is further ordered, That this order shall continue in force until the further order of the commission.

APPENDIX B

In *Terminal Railroad Association* v. *United States,* 266 U. S. 17, the East Side Lines, who were represented by at least one of the learned counsel who appears for them here and who subscribed to their briefs in both cases, said in their main brief in that case (p. 27):

WHAT ARE THE POWERS OF THE INTERSTATE COMMERCE COMMISSION IN REFERENCE TO THE MATTER HERE IN CONTROVERSY?

It would be tedious and altogether unnecessary to cite the many cases determined by this Court, holding that where a matter is within the cognizance of the Interstate Commerce Commission no appeal can be made to the Courts until and unless application has been first made to the Commission. *Texas & Pacific Railroad Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, is of course the leading case on that subject, and it has been followed by many decisions such as *Robinson* v. *B. & O. R. R. Co.,* 222 U. S. 506; *I. C. C.* v. *I. C. R. R. Co.,* 215 U. S. 452; *B. & O. R. R. Co.* v. *Pitcairn Coal Co.,* 215 U. S. 408; *Procter & Gamble* v. *United States,* 225 U S. 282; *Southern Railway Co.* v. *Reid,* 222 U. S. 425.

The Interstate Commerce Act has given from time to time broad and still broader powers over the railroad system. We mention the following as examples of this control:

Section 1, Par. 4, makes it the duty of every common carrier to establish through routes and

just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein.

The term "car service" is by Section 1, Par. 10, defined to be, among other things, the interchange of cars and other vehicles used in the transportation of property.

And by Section 1, Par. 11, it is made the duty of every carrier to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect of car service.

By Section 3, Par. 3, it is provided that all carriers engaged in the transportation of passengers or property shall afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding, and delivering passengers or property to and from their several lines and those connecting therewith.

By Section 15, Par. 3, it is provided that the Commission may establish through routes, joint classifications and joint rates, fares, or charges, and the divisions of such rates, fares, or charges, and the terms and conditions under which such through routes shall be operated.

By section 15, Par. 6, it is provided that the Commission finding that the divisions of joint rates, fares, or charges is unjust, unreasonable, inequitable, or unduly preferential may, by order, pre-

scribe the just, reasonable, and equitable divisions thereof to be received by the several carriers.

By section 208 of the Transportation Act, 1920, it is provided that all rates, fares, and charges, and all classifications, regulations, and practices, which on February 29, 1920, were in effect, should continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law.

And by Par. (b) of said Section 208 it was provided that all divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively.

What are the powers of the Interstate Commerce Commission in reference to the matter here in controversy and what was the purpose of passing the Transportation Act is stated concisely in the opinion of this Court, delivered January 7, 1924, in the case of *Dayton-Goose Creek Ry. Co.* v. *The United States.* We make the following extract:

> The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission which is to supervise their issue of securities, their car supply and dis-

tribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

A very large part of these powers had been conferred on the Interstate Commerce Commission prior to the passage of the Transportation Act and the amendments at that time made in the Interstate Commerce Act. But if we appeal to the law as it was written before or since the passage of the Act, practically the same result would be reached. We have had no hesitancy, however, in reciting the terms of the present law, for the reason that in matters of public concern, decrees of Courts and their execution are to be governed by laws in force when the decree is called in question.

Hodges v. *Snyder*, 261 U. S. 600, and the *Wheeling Bridge case* therein referred to.

Thus while the Commission has had jurisdiction to prescribe divisions of joint rates since 1906 (34 Stat. L. 584, approved June 29, 1906), the scope of that power has been extended and emphasized by the Transportation Act, 1920 (41 Stat. L. 484, approved February 28, 1920). The Commission, under the direction of Congress in this latter act, has divided the carriers of the United States into groups for rate-making purposes. (Section 15a, Interstate Commerce Act, 41 Stat. L. 488, approved February 28, 1920.) The Mississippi River was made the dividing line between the Eastern, Western and Southern groups. (Increased Rates, 1920,

58 I. C. C. 220, at 225.) In the same proceeding the Commission also prescribed rate levels for groups thus created. In prescribing rate levels for groups it is an important adjunct of the Commission's authority for it to apportion revenue resulting from joint rates among groups of carriers so as to provide "as nearly as may be" a fair return for each group. *The New England Divisions Case,* 261 U. S. 184. In the present case the West Side Lines are in the rate group denominated by the Commission in *Increased Rates, 1920, supra,* as the Western group, while the East Side Lines are, generally speaking, either in the Eastern or Southern Group. Consequently the apportionment of divisions of joint rates as between carriers and the decision as to which set of carriers should pay for transfer charges on traffic moving from one rate group to another, has more than ever become a matter of administrative discretion for the Interstate Commerce Commission, which is directed by Congress to prescribe rates that shall yield for each group the "fair return" provided by the Act. (Section 15a, Interstate Commerce Act.)

Obviously such a fair return can not be determined without also exercising an authority in respect to the division of earnings under joint rates and the apportionment of expense that shall be made in respect to traffic moving between the groups established by the Commission. Hence, while the division of joint rates has for eighteen years been a matter within the exclusive primary jurisdiction of the Commission, the new law has emphasized the necessity for guarding the jurisdiction thus conferred by Congress as exclusive at least until after the Commission shall have acted.

In their reply brief the same learned counsel further maintained (p. 25):

THE ACTIVITIES OF TERMINAL ASSOCIATION ARE SUBJECT TO THE EXCLUSIVE CONTROL OF THE INTERSTATE COMMERCE COMMISSION UNDER THE TRANSPORTATION ACT OF 1920

The appellees argue that the Transportation Act of 1920 does not apply to the regulation and control of the Terminal Association, since they say that they and the East Side Lines have agreed upon the use of the terminal properties, and the appellees seem to contend that the Interstate Commerce Commission would only have jurisdiction over this terminal situation in the event of a disagreement. (Brief for appellees, p. 22.)

In the light of the controversy that is now raging both over the use of the terminal properties as well as the payment for such use, we are utterly at a loss to understand how the appellees conceive that no such disagreement exists at present between themselves and the East Side Lines.

The Terminal Association insisted in its brief, and again reiterates, that the Transportation Act of 1920 vested exclusive jurisdiction in the Interstate Commerce Commission to control the relations between these Terminal Companies and all the user lines, whether Proprietary or Nonproprietary, and that if the West Side Lines are not satisfied with the present method and practice under which the terminal charges are imposed, then their remedy lies before the Interstate Commerce Commission and can not be invoked as growing out of the violation of any Court decree.

We further contended, and still contend, that this Court has no jurisdiction to disturb rate conditions which have existed here since 1877, and the destruc-

tion of which would not profoundly disturb the revenues of other eastern carriers at this gateway not parties to these proceedings, but would affect the rate structures now in effect at other crossings of the Mississippi River.

It seems to us too clear for much argument that this action is but an effort on the part of the West Side Lines to obtain by indirection and through an order of Court a change in a matter which is originally and exclusively within the power and authority of the Interstate Commerce Commission.

It is difficult to understand why the West Side Lines, if they feel themselves unfairly treated, have not taken this controversy to the Interstate Commerce Commission, where their right to relief is perfectly clear, provided their cause be just.

Representative Mann (Illinois) on April 12, 1910, moved that the House resolve itself into the Committee of the Whole House for the consideration of the bill H. R. 17536, the railroad-rate bill. (Cong. Rec. Vol. 45, Pt. 5, 61st Cong., 2d Sess., p. 4571.) Speaking to the bill, Representative Mann said (pp. 4572, 4573, 4578, 4579):

> Broadly speaking, the propositions involved in the pending bill may mostly be covered under three general heads:
>
> * * * * *
>
> Second. Enlarging the statutory duties of the railways and the rights of shippers and increasing the powers of the Interstate Commerce Commission; so that classifications, regulations, and practices shall be just and reasonable and enforceable as such, whether affecting the rates charged or not.
>
> * * * * *
>
> Mr. MANN. We have conferred upon the Interstate Commerce Commission the broadest kind of powers now so far as railway rates are concerned, and we are proposing in this bill to greatly enlarge their power by giving them the same power over classifications, regulations, and practices which they now have over rates. That power is in the way of a legislative power which can not be conferred upon the courts, and we

have, so far as that is concerned, I think, in the law restricted the power of the courts just as far as it is possible for legislation to restrict it. And I sometimes think possibly we have restricted it too much, and yet there has been no injury from that cause as yet.

* * * * *

REGULATIONS AND PRACTICES

Just how far that term goes—regulations and practices affecting rates—has never been fully determined by the courts. The Interstate Commerce Commission exercises the power over the rates. They have never exercised the power over classification of freight, although classification of freight is just as important as rates, because by moving a particular article from one class to another you affect the rates. They have never exercised the power over certain practices of the railroads or regulations of the railroads which may seem apart from the question of rates. The practice of the law is that Congress first declares the duty of the railroad companies and, under existing law, declares that rates must be just and reasonable. The rest is conferring power upon the commission to ascertain the fact; but the jurisdiction of the commission depends, first, upon the declaration by Congress that it is the duty of the railroads to make rates just and reasonable.

That is contained in section 1 of the existing law, and we propose an amendment to that law, as follows:

And it is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this act which may be necessary or convenient to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this act upon just and reasonable terms, and every unjust and unreasonable classifications, regulation, and practice is prohibited and declared to be unlawful.

This is a distinct step forward in the control of the railroads. It undertakes to require, when carried out in the rest of the bill, the duty on the part of the railroads to

make just and reasonable regulations and practices, and gives to the commission in succeeding sections of the bill the power, if the railroads do not make just and reasonable classifications, regulations, and practices, to make them and to enforce them on the railroads.

* * * * *

We cover part of them under existing law, but there are a great many provisions, as the gentleman can understand, arising from the countless transactions throughout the United States where regulations and practices are agreed to by railroads, where they have one practice on one railroad and another practice on another road, practices affecting the same matter not now controlled by the commission, but under these provisions of the law the commission will have control over these matters.

Representative Mann (Illinois), on May 5, 1910, moved that the House resolve itself into the Committee of the Whole House for further consideration of the bill H. R. 17546, the railroad rate bill. (Cong. Rec. Vol. 45, Pt. 6, 61st Cong. 2d Sess., p. 5839.) In the course of the remarks the following occurred (p. 5852):

Mr. MANN. Mr. Chairman, so far as I could learn from the reading of the amendment, everything in it is now covered in the bill. It would be too dangerous to reinsert it a second time in different language. Section 6a of the bill, amending section 1, makes

it the duty of common carriers to establish just classifications, regulations, and practices in reference to a number of things that are enumerated in the bill, and practically covering everything in connection with the receipt, handling, transporting, storage, and delivery of property subject to the provisions of the act which may be necessary or convenient to secure the safe and prompt receipt, handling, transportation, and delivery of property upon just and reasonable terms; and every unjust and unreasonable classification and practice is prohibited and declared to be unlawful. That is all in section 1. It imposes that duty on railway carriers, and section 13 of the act provides that if this is not done complaint can be filed before the commission, or the commission, on its own initiative, may make the investigation. Section 15 of the act to regulate commerce, which is section 9 of this bill now under consideration, gives to the commission, if the railway company does not establish these just and reasonable regulations, practices, classifications, and rates, the power to establish them, and require the railway company to enforce and observe them.

That language is carefully worked out in connection with the existing law so as to be sure it is constitutional. I do not know what the effect of the gentleman's amendment would be, but it would duplicate language, possibly, in a form which would not meet the approval of the courts. In the language

which we have employed we have followed the provisions as to form of the existing law, which has been construed by the commission and the courts. We are on safe ground. We give to the commission under this bill the authority to enforce upon the railroad companies any reasonable regulations and practices, classifications, or rates which may be necessary in the handling, receiving, storage, or transportation of property, and nothing further can be done. The gentleman's amendment is unnecessary, and I fear it would be dangerous to insert it in the bill.

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Office Supreme Court
FILED
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CHARLES ELMORE

No. 404

In the Supreme Court of the United States

OCTOBER TERM, 1927

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR INTERSTATE COMMERCE COMMISSION

J. STANLEY PAYNE,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

MARCH, 1928.

U. S. GOVERNMENT PRINTING OFFICE: 1928

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 404

THE BALTIMORE AND OHIO RAILROAD COMPANY et al., appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., appellees

BRIEF FOR INTERSTATE COMMERCE COMMISSION

STATEMENT OF THE CASE

This is an appeal under the Act of October 22, 1913, 38 Stat. 219, from a decree of the District Court for the Northern District of Illinois, Eastern Division (Anderson, Circuit Judge, and Wilkerson and Cliffe, District Judges), dismissing, for want of equity, a bill brought by thirteen railroad companies [1] to enjoin and set aside an order of the In-

[1] Baltimore & Ohio R. R. Co.; Chicago & Alton R. R. Co.; Chicago & Eastern Illinois Ry. Co.; Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.; Illinois Central R. R. Co.; Illinois Traction, Inc.; Litchfield & Madison Ry. Co.; Louisville & Nashville R. R. Co.; Mobile & Ohio R. R. Co.; New York, Chicago & St. Louis R. R. Co.; Pennsylvania R. R. Co.; Southern Railway Company; Wabash Railway Company.

terstate Commerce Commission requiring them to bear or absorb the charges for transfer services from their lines in East St. Louis, Illinois, to the lines of six railroad companies [2] in St. Louis, Missouri, on westbound freight traffic passing through both East St. Louis, Illinois, and St. Louis, Missouri, on combination rates which are the same on St. Louis as on East St. Louis. (R. 27–29.)

No opinion was delivered by the court below.

The Commission's order was entered in a proceeding entitled *Chicago, Rock Island & Pacific Ry. Co. et al.* v. *Baltimore & Ohio R. R. Co. et al.*, the report in which is published at 113 I. C. C. 681. The order (R. 27–28) was directed against 39 railroad companies but only the 13 who are appellants herein joined as plaintiffs in the suit to annul the order. (R. 1.)

Proceedings Before the Commission

The complaint (R. 30) was filed February 5, 1925. Hearing was held at St. Louis September 21 to 26, 1925, before an examiner of the Commission, in which all parties participated (R. 75–392). A proposed report by the examiner was issued, to which certain exceptions were taken; briefs were filed and the case was orally argued before the Com-

[2] The four who were complainants before the Commission, viz, The Chicago, Rock Island & Pac. Ry. Co.; Missouri-Kansas-Texas R. R. Co.; Missouri Pacific R. R. Co.; St. Louis-San Francisco Ry. Co.; and two who were cross complainants, viz, the Chicago, Burlington & Quincy R. R. Co.; and the Wabash Railway Company.

mission. July 12, 1926, the Commission rendered its report and order. August 14, 1926, defendants petitioned the Commission for reargument and reconsideration, which was denied. The effective date of the order was October 12, 1926, but by supplemental order (R. 30) it was postponed until December 11, 1926, when it became operative.

The four complainant railroad companies operate lines which extend westward from St. Louis, Missouri, and are called west-side lines. The appellants were among the principal defendants. They operate lines on the east side of the Mississippi river, terminating at East St. Louis, Illinois, and they are called east-side lines.

None of the steam lines, either west side or east side, has its own rails across the Mississippi river between St. Louis and East St. Louis, and there is no direct physical connection between any west-side line with any east-side line in the St. Louis-East St. Louis District. In all instances connection is made through the intermediary of the Terminal Railroad Association of St. Louis and its subsidiaries, all of which are collectively referred to herein as the Association. (Ex. 4.) [3]

The Association is a terminal transfer and switching company with facilities on both sides of the Mississippi river, connected by two bridges, the

[3] This statement is correct in reference to all steam lines. The Illinois Traction System, an electric line, has rails over its own bridge into St. Louis, and it interchanges traffic with the west-side lines in St. Louis. (R. 90.)

Eads and the Merchants. It has connections with all railroads on both sides of the river. The Association is a cooperative enterprise, being owned jointly by 15 of the east-side and west-side carriers. (R. 76; Ex. 4.) It operates under contract with the various proprietary and tenant carriers, and under those contracts the carriers have trackage rights over the rails of the Association between St. Louis and East St. Louis. (Ex. 51.) These trackage rights are exercised by all carriers for passenger traffic, and by two carriers, the Chicago & Eastern Illinois and the Wabash, for freight. (R. 90; 192; 200; 297; Ex. 4, p. 50.) The other carriers utilize the services of the Association for transferring freight. Under the contracts mentioned, the properties of the Association constitute, in effect, an extension of the rails of the east-side lines into St. Louis, and, at the same time, an extension of the rails of the west-side lines into East St. Louis. By virtue of this joint facility the routes of the east-side carriers to St. Louis and of the west-side carriers from East St. Louis overlap between St. Louis and East St. Louis.

As stated in the Commission's report, in addition to the facilities that the Association affords them, several of the east-side lines own or lease other facilities in St. Louis, such as depots and team tracks, where they receive and deliver in their own names traffic moving between St. Louis and points on their lines. The east-side lines advertise through service to and from St. Louis, and in their tariffs

show St. Louis as a point on their lines. In apparently all respects as to both freight and passenger traffic the east-side lines individually recognize St. Louis as a station on their lines. (R. 81–86; 89; 205–206; 211–218; 239; Exs. 4; 21–24; 30–47; 49.)

The transfer charges of the Association vary according to the commodity, ranging from 1½ cents per 100 pounds on low-grade commodities like coal and iron ore to 5 cents per 100 pounds on commodities taking first-class rates. These charges are not collected by the Association directly from the shippers, but in all instances are paid to the Association by the line-haul carriers. Their rates include the transfer, and they pay the Association's charges out of those rates. The proceeding before the Commission presented the question whether the east-side lines or the west-side lines should pay and bear the Association's transfer charges on westbound through freight.

The complaint of the west-side lines alleged that for many years the east-side lines had refused to pay any part of these charges on through freight, either eastbound or westbound; that they had compelled the west-side lines to pay such charges on all freight in both directions; that their action in refusing to pay the charges on through traffic in one direction (westbound) constituted a practice which was unjust and unreasonable, unjustly discriminatory, and unduly preferential and prejudicial, in violation of sections 1, 2, and 3, respectively, of the Interstate Commerce Act. The west-side

lines were willing to continue to pay the transfer charges on *eastbound* traffic, and for that reason they sought relief only in respect of *westbound* traffic.

The complaint further alleged "that under a proper, just, reasonable, lawful, nonprejudicial and nonpreferential practice, the point of interchange as to all through westbound traffic should be on the west side of the Mississippi river" (R. 35–36); and that the east-side lines had "failed, neglected, and refused * * * to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, all in violation of the duties imposed upon them by the Interstate Commerce Act" (R. 36). Reparation was asked.

The Chicago, Burlington & Quincy Railroad Company and the Wabash Railway Company each has a line which enters East St. Louis from the east and a line which enters St. Louis from the west. Both were named as defendants and both filed cross-complaints with respect to trans-Mississippi traffic moving over their lines west of the river and interchanged with each other or with any of the other east-side lines through the St. Louis-East St. Louis gateway, and, to the extent that they were cross-complainants, sought whatever relief was accorded complainants.

St. Louis is one of the important gateways of transportation between the east and the west and southwest. The eastern and western carriers

whose lines are joined by the Association maintain through routes between points on their lines, and, with other carriers with whom they in turn connect, between practically all points in the United States. A large part of the traffic over these through routes via this gateway moves on joint rates; where joint rates are not in effect the traffic moves on combinations of separately established rates, and, as a rule, the applicable combination is the one made on St. Louis or East St. Louis. Subject to but few exceptions, the combination made on St. Louis is the same as that made on East St. Louis. This is due to the fact that both the east side and the west side lines accord like rates to both points. As an example, the rate of the east-side lines on wrought pipe from Youngstown, Ohio, to East St. Louis and to St. Louis is 21.6 cents and the rate of the west-side lines from East St. Louis and from St. Louis to Augusta, Kansas, is 33.5 cents. Therefore, whether the combination be figured on St. Louis or on East St. Louis, the through combination rate is the same, viz, 55.1 cents. (Ex. 73.)

In all such cases the east-side lines followed the practice of applying the *East St. Louis* combination and refusing to apply the *St. Louis* combination. The purpose and effect of this practice was to compel the west-side lines to pay the charge for transferring the traffic across the river. The application of the East St. Louis combination put the west-side line under the necessity of paying the transfer

charge out of its rate to or from East St. Louis. Of course, if the St. Louis combination were applied, instead of the East St. Louis combination, the necessity of paying the transfer charge would fall upon the east-side lines. To prevent the application of the St. Louis combination and to compel the application of the East St. Louis combination, the east-side lines carried a provision in their published tariffs to the effect that where no joint rate was provided and the combination was the same on St. Louis as on East St. Louis, the through rate would be made on the East St. Louis combination. (R. 261.) In this regard the Commission stated in its report as follows:

> "On traffic in both directions, where the combination is the same on St. Louis as on East St. Louis, the east-side lines apply their St. Louis-East St. Louis rates only to or from East St. Louis, leaving it to the west-side lines to protect the combination rates by applying the St. Louis-East St. Louis rates to or from East St. Louis. This, of course, compels the west-side lines to pay the cost of the transfer, and leaves the full St. Louis-East St. Louis rates for the east-side lines. The entire practice above outlined is in accordance with the tariffs of the east-side lines, which contain a provision to the effect that where no joint rates are provided and the combinations are the same on St. Louis as on East St. Louis, through rates will be made on the East St. Louis combinations. This provision is intended to mean that the

> east-side lines' local rates to and from St. Louis may not legally be used as proportional or basing rates on traffic coming from or destined to points beyond. It has no effect on the amount of the through rates, nor does it create joint rates, but it is a direction to agents and accounting forces to use the east-side lines' factors in the combination rates only to or from East St. Louis." (R. 19.)

The Commission found that for the future the practice of the east-side lines in requiring the west-side lines to bear the transfer charges on westbound freight traffic moving through St. Louis and East St. Louis on combination rates which are the same on St. Louis as on East St. Louis will be unjust and unreasonable, and that the just and reasonable practice with respect to such traffic will be for the east-side lines to bear or absorb all such transfer charges. In making this finding the Commission said:

> "As a rule, the carrier which performs the inbound haul, the delivering carrier, switches or trucks the freight to its connection, or pays the expense of that service if performed by a third party. * * * Among the few instances throughout the country in which reciprocity does not prevail is the situation here presented. * * *"
>
> "Defendants' practice is contrary to the generally accepted practice throughout the country. The usual practice among rail carriers is to divide the switching expenses when the services of an intermediate carrier

are utilized in effecting interchange, the switching charge being absorbed by the carrier that delivers the traffic to its connection. There is a generally recognized obligation on part of all carriers on through traffic to make delivery on the rails of their connections, either direct or by bearing the charges of the intermediate-switching line, and this is the general practice of railroads throughout the country. We believe this to be a just, fair, and reasonable practice for general application, and one which should be followed by the carriers serving the St. Louis-East St. Louis district. We are not unmindful of the fact that such a practice, if applied at St. Louis and East St. Louis, can not bring about exact reciprocity because the volume of the through traffic is considerably greater eastbound than westbound, but complainants are not asking for exact reciprocity; moreover, we believe that adoption of this practice at interchange points generally would distribute the costs of interchange switching among the respective carriers as a whole in a fair and equitable manner."

With respect to traffic moving on joint rates, the Commission said:

"As to this traffic the carriers' divisional arrangements provide that the joint rates, eastbound and westbound, shall break on East St. Louis; that is, that certain proportions shall accrue up to that point and certain proportions beyond. Generally speak-

ing, the divisional arrangements make no specific provision regarding the payment or disposition of the transfer expense. However, as the joint rates break on East St. Louis and as the transfer takes place west of that point the east-side lines have always left the transfer expense in connection with both eastbound and westbound through traffic moving on joint rates to be borne by the west-side lines. Apparently, in only one instance, affecting a relatively small volume of traffic, do the divisional arrangements make any specific provision respecting the transfer. In this instance provision is made for deducting, before prorating, an amount in excess of the transfer expense and adding it to the proportion accruing to the west-side lines. The deduction, of course, has the effect of apportioning the expense between the east-side and the west-side lines."

The Commission made no definite finding in respect to westbound traffic moving on joint rates. It said:

"* * * we are not convinced that the reception for a number of years by the west-side lines of divisions of such joint rates in which the transfer charge was included does not constitute an acquiescence by the west-side lines in such divisions which is tantamount to an agreement on their part to pay the transfer charge on such traffic. As to traffic moving under joint rates, therefore, we are not prepared at this time to make a definite finding upon the issues and record

> before us. We commend to the interested carriers, however, a careful study of the divisions of joint rates on westbound traffic, with a view to readjustment thereof if and where necessary to conform to the just and reasonable practice in respect of interchange switching hereinabove approved for general application. If this is not done within a reasonable time complainants are at liberty to again bring this matter to our attention."

Accordingly, the Commission's order has no application whatever to the transfer charges on traffic moving on joint rates. It is expressly confined to the transfer charges on traffic moving on combination rates and then only when the St. Louis combination is the same as the East St. Louis combination.

The allegations of the complaint of unjust discrimination and undue prejudice and preference in violation of sections 2 and 3 of the Act were not sustained; and the prayer for reparation was denied.

The Evidence

In addition to the evidence supporting the above-stated facts, the record contains much other important evidence, and in view of the appellants' contention that the evidence was insufficient, a further statement of the facts established by the record is here set out.

The stock of the Association is held in equal proportions by 15 of the east-side and west-side car-

riers. (R. 76–77.) Five of the 15 are west-side carriers, the remaining 10 are east-side carriers. The east-side carriers hold a majority of the shares. (R. 93.) Representatives of the east-side carriers have always constituted a majority of the Board of Directors of the Association. (R. 93.) It was testified that through this domination and control of the Association's Board of Directors, the east-side lines for many years have been able to force the west-side lines to pay and bear the transfer charges on through traffic in both directions. (R. 95.)

The Association is a common carrier, but may not legally operate in all respects as a railroad transportation company, having been perpetually enjoined from operating otherwise than as a terminal and interchange facility for railroads in *United States* v. *St. Louis Terminal,* 224 U. S. 383, and 236 U. S. 194. Exhibit No. 50 is a copy of the final decree in that proceeding, filed March 2, 1914, as amended by the decree of January 29, 1917.

The charges for the transfer and other services performed by the Association are fixed at a figure which is sufficient only to pay its operating and other expenses. No profit has ever been made out of the operation of its properties and no dividend has ever been declared on any of its outstanding stock. The 15 railroads which constitute the Association are guarantors of the bonds and other obligations of the Association and are its sponsors. (Ex. 58.)

Exhibit No. 51 is a copy of the various agreements between the Association and its proprietary companies. The original agreement was made in 1889; it was amended Sept. 21, 1914, to conform to the decree in *United States* v. *St. Louis Terminal, supra.* The exhibit consists of 145 printed pages. As found by the Commission these agreements contemplate that all carriers shall have equitable treatment in the matter of service, rights, accommodations, benefits, burdens, charges, and *expenses.* This exhibit was introduced by the west-side lines to show that through their payment of the transfer charges on nearly all traffic in both directions they are contributing in major part to the Association's expenses and that, therefore, its expenses are not equitably apportioned, although the contracts contemplate that they should be.

The east-side lines operate their passenger trains in their entirety to and from the Union Station in St. Louis, usually hauling them with their own locomotives. (R. 200.)

Passenger, mail, and express traffic passing through St. Louis is interchanged between the east-side and west-side carriers at the Union Station in St. Louis. (R. 202.)

The Chicago & Eastern Illinois (an east-side line) interchanges its through traffic direct with the Frisco and Missouri Pacific (west-side lines) at 23d St., St. Louis, handling its freight with its own power over the tracks of the Association, using the

Merchants bridge, but the west-side lines pay and bear the transfer expense just as though the service had been performed by the Association. (R. 90, 197.)

A history of the efforts made by the west-side lines, beginning in 1905, to obtain relief from the transfer expense on traffic in one direction is given at R. 91–95, 237–238, and 343–344. Only part of this need be referred to. In August, 1914, the west-side lines attempted to change the practice by declining to pay the transfer expense on eastbound traffic. The eastern lines refused to accept the freight unless the transfer was paid by the west-side lines. (R. 268–269.) As a result several hundred cars were handled between the western and eastern lines many times. Congestions followed; the Terminal became blocked. (R. 92.) At a meeting of the Board of Directors of the Association held at this time it was voted to refuse to handle the traffic unless the western lines guaranteed the transfer charge. (R. 92–93.) At that meeting the eastern lines were in a majority. (R. 93.) Meanwhile, many complaints had been made to the Commission by shippers because of delay to their freight, and the Commission took the matter up informally with the carriers. Thereupon, the western lines, in order to prevent further hardships upon their patrons, yielded and resumed their old practice of paying the transfer charge on eastbound as well as on westbound traffic. (R. 343–344.) In August, 1920,

the west-side lines instituted the contempt proceedings referred to in *Terminal R. R. Asso.* v. *United States,* 266 U. S. 17. This court there held that the subject should be first submitted to the Commission and thereupon the west-side lines filed the complaint which began the present proceedings. (R. 94.)

There was much evidence to support the finding of the Commission regarding the generally accepted practice of carriers throughout the country of reciprocally assuming the expenses of interchange service. This evidence consisted of a comprehensive and detailed statement of the practice prevailing at a great many points of interchange in the United States where investigation has been made, supplemented by the testimony of experienced railway traffic and operating officials who were familiar with the general practice. (R. 104–182; 207–211; 220–223; 224–234; 238–239; 362–363; 385–386.)

This testimony shows that the following practice generally prevails:

Where two carriers connect directly, the line carrying the freight to the point of interchange, i. e., the delivering carrier, delivers the freight upon the joint interchange tracks. (R. 104–105, 107.)

Where no direct physical connection exists and it is necessary to use the services of an intermediate switching line, the customary practice is for the delivering line to assume and bear the expense of making delivery of its freight to the receiving line,

using the intermediate switching line in order to effect that delivery. (R. 105–107.)

Witness James E. Hutchison, Vice President in charge of operations of the St. Louis–San Francico Railway, described the practice as follows:

> "* * * The principle has been universal that a railroad bringing traffic to a terminal which is to be delivered to another railroad, either for placement at industries on that line of road or for movement out over that line of railroad, stands the expense incident to such delivery.
>
> In many cases the railroads do not have direct connection one with the other and an intermediate line of some description is used. In such cases it has been the practice that the line that originates the business or brings it into a terminal for delivery to another line compensates the intermediate line for any service it may render, either by the use of its rails or switching service which it may perform in effecting the delivery." (R. 220.)

In some instances the receiving line, instead of the delivering line, pays the expense of intermediate switching, "But in any event, the practice is always reciprocal between the lines." (R. 222.)

The Car Service Rules of the American Railway Association, an association representing practically all the railroads of the United States, recognize that there is an obligation on the part of carriers to make delivery of through traffic to the receiving

carrier in its yard and on its designated track for receipt of the traffic, either by direct delivery with the power of the delivering line or by using an intermediate-switching line to act as its agent in effecting delivery of the through shipment. (R. 224.) The obligation of the inbound carrier has not been fulfilled when the shipment has reached the end of its rails; there is a further obligation, that of placing the shipment in the proper channel for its continuous movement to final destination. This can be done only by the delivery of the shipment in the yard of the outbound carrier. Whether this is accomplished direct by the use of the inbound carrier's power, or through the agency of an intermediate-switching line, or through a reciprocal arrangement between the carriers whereby the receiving line performs for the delivering line the service for which the delivering line is responsible, the principle is the same. Rule 6 of the code of Car Service Rules of the American Railway Association reads in part:

> " Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and to insure delivery, and accepted by the car inspector of the receiving road." (R. 225.)

Further obligation of the delivering line is recognized in American Railway Association Car

Servive Rule 14, which rule places upon delivering line the responsibility for cost of transfer of shipments delivered in cars which can not be forwarded by receiving line because of (a) defective equipment; (b) improper loading or overloading; (c) when delivering line does not desire its equipment to go beyond junctions; (d) when cars can not pass approved clearances. Under these sections of rule 14 it is the recognized obligation of the delivering carrier to not only make delivery in the yard of the outbound carrier but to insure the through and uninterrupted movement of the shipment by the outbound carrier, or assume the costs of placing the shipment in condition for such forwarding by the outbound line. (R. 225.)

Regarding traffic delivery at destination, there is a recognized obligation on the part of the inbound carriers to effect final delivery to consignee at billed destination, either upon the rails of the inbound carrier or upon the rails of a terminal switching line within designated switching limits. The obligation is further assumed when it is necessary to effect delivery to a consignee on a terminal switching line through an intermediate switching line. (R. 226.)

In accepting a shipment at point of origin for transportation to final destination there is no difference in principle between the obligation of the carrier to make final delivery at destination and the obligation to effect delivery to the outbound carrier at the junction point where shipment leaves its line

in the through movement to destination. In the first instance the inbound carrier assumes the expense of effecting actual delivery to consignee on its own rails, on the rails of a terminal switching line, or through an intermediate switching line and a terminal switching line, and in addition recognizes the terminal switching line and intermediate switching line as its agents. This is evidently the intent of the American Railway Association Per Diem Rule 5 which reads in part:

> "An amount for each car in switching service may be reclaimed by each individual switching road from the road *for which the service was performed.* This amount shall be based upon the average number of days, not to exceed 5, for cars handled in terminal switching service. * * *" (R. 227.) (Italics ours.)

The Association makes a per diem reclaim as to east and westbound through traffic moving across the Mississippi river at St Louis and East St. Louis. The reclaim made by the Association where westbound through traffic is involved is made upon the delivering carrier, viz., the east-side line. Where eastbound traffic is concerned the reclaim is likewise made against the delivering line which in this instance is the west-side line. The practice of making a per diem reclaim on the east-side lines as to westbound traffic has been in effect at the St. Louis terminal for 10 or 15 years. (R. 241–242.) This evidence was adduced to show that, while the west-

side lines have paid the Association's transfer charge, nevertheless there was a recognition by the east-side lines of the fact that the Association was their agent in performing the transfer service in that they honored the Association's per diem switching reclaims, under rule 5 of the Car Service Rules of the American Railway Association, which provides that such per diem shall be paid by the line "for which the service was performed."[1]

The situation at St. Louis as between the east-side lines, on the one hand, and the west-side lines, on the other hand, is entirely divorced from the general practice, in that the west-side lines are required to assume the intermediate switching expense on through traffic in both directions. (R. 228.)

The practice between carriers in the method of interchange—reciprocity in taking care of the switching charges—is in effect at junctions where the rates are on combinations of locals, as well as where the rates are joint through rates. (R. 373; 375; 385–386.)

It was shown that the east-side carriers themselves follow the above practice generally when

[1] Compare *Mo. Pac. R. R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366. In regard to per diem reclaims see *Industrial Railways Case*, 29 I. C. C. 212, 231; *Birmingham So. R. R. Co.* v. *Ala. Great So. R. R. Co., Director General, Agent*, 61 I. C. C. 551. Section 15 (8) of the Interstate Commerce Act, giving shippers the right to route traffic under certain circumstances, recognizes that it is the duty of each carrier in a through route to transport the property over its own line "and deliver the same to a connecting line or lines * * *."

interchanging traffic other than that passing between them and the west-side lines through East St. Louis-St. Louis. For example, at East St. Louis the east-side lines interchange traffic with each other (traffic not crossing the river) through the intermediary of the Association and the interchange expenses are borne reciprocally. (R. 137–153.)

The evidence regarding the interchange practice of carriers was practically undisputed; and only two exceptions to the general practice were shown (1) interchange at St. Louis between the Illinois Traction System and the west-side lines, through the intermediary of the Association, where the expense is borne by the Traction System on traffic in both directions (R. 153–156), but this is no doubt due to the fact that the service performed by the Traction System in handling traffic over its bridge into St. Louis is paid for by the west-side lines on traffic in both directions (R. 90); (2) interchange between certain carriers at Cincinnati, Ohio-Covington, Ky. There the expense of interchange between the Big 4 and the L. & N. is borne by the L. & N. on traffic in both directions, but this is not in fact an exception to the general rule because the rails of the Big 4 do not extend to Covington. (R. 199.)

Based on a test period of 28 months on westbound traffic, and of 17 months on eastbound traffic, the carload movement between the four west-side lines and the east-side lines at St. Louis and

East St. Louis was divided, on the average per month, 29 per cent westbound and 71 per cent eastbound (R. 242–246; 247–248; 250–251; Exhibits 52, 53, 55, and 56.) On that basis the transfer charges of the Association on this traffic during 12 months embraced within both of those periods would have divided $1,746,016.55 on eastbound traffic and $713,161.69 on westbound traffic. These were the aggregate transfer charges of the Association on all traffic interchanged between the east- and west-side lines, including traffic moving on joint rates as well as on combination rates.

Evidence Regarding Rates

The evidence showed the various rate territories between which joint rates are in force and those between which the St. Louis-East St. Louis combinations apply. (R. 279, 281, 283, 291, 292, 298, 329, 339, 342, 343.) In the opinion of one witness, a traffic official, not over 15% of the traffic moves on combination rates which are the same on St. Louis as on East St. Louis. (R. 390.)

From all territory east of the Mississippi river, except a zone within 100 miles east of East St. Louis, the rates of the east-side lines are the same to St. Louis as to East St. Louis. This has been true since 1908. (R. 267.) From the 100-mile zone mentioned, which includes a large bituminous coal producing area, the rates are higher to St. Louis than to East St. Louis. (R. 267.) Through traffic from this zone to points west of St. Louis

moves on joint rates and therefore the order in question does not apply thereto. (R. 281, 283, 292, 298.)

On all traffic from the territory east of the Mississippi destined to St. Louis, and on all traffic originating at St. Louis and destined to that territory, the east-side lines pay and bear the transfer charges of the Association. (R. 297.)

To territory within about 100 miles west of St. Louis the rates of the west-side carriers from East St. Louis are higher than from St. Louis, sometimes to the extent of the Association's transfer charge. (R. 364.) No joint rates are in effect to this territory on traffic from points east of the Mississippi (except from the 100-mile zone east of East St. Louis) and this traffic moves on combination rates. The St. Louis combination, and not the East St. Louis combination, is applicable, because the St. Louis combination is the lower, due to the fact that the St. Louis-East St. Louis rates of the east-side carriers are on a common level, while the rates of the west-side lines from East St. Louis to this 100-mile territory are higher than from St. Louis. With respect to this traffic there is no question as to who must bear the transfer expense, as it is included in only one of the rate factors, i. e., the factor of the east-side lines to St. Louis. On this traffic, therefore, the east-side lines have paid and borne the transfer expense. (R. 99–102; 482; Ex. 7.)

To all territory west of the Mississippi (except the 100-mile zone) the rates of the west-side lines

from East St. Louis are the same as from St. Louis. (R. 364–365.)

On traffic from eastern points to western points beyond the last-mentioned 100-mile zone, on which the St. Louis and East St. Louis combinations are equal, the east-side lines have refused to apply the St. Louis combination, have forced the application of the East St. Louis combination, and have thus compelled the west-side lines to pay the transfer expense out of their rate factor from East St. Louis.

As a result, the east-side lines receive a greater net revenue on through traffic than they do on local St. Louis traffic. As previously shown, St. Louis is a station on the lines of the east-side carriers, and, with the exception of the 100-mile zone east of East St. Louis, their rates are the same to St. Louis as to East St. Louis. Through the agency of the Association their rails reach and serve industries in St. Louis. The east-side lines absorb all switching and other charges necessary to effect such deliveries in St. Louis at the St. Louis rate. (R. 297.) Of course, on this traffic the east-side lines pay the Association's charge for transferring the traffic across the river, but when the traffic is transported to a point on a west-side line beyond the St. Louis switching district and beyond the 100-mile zone, the east-side line refuses to pay the transfer expense. Thus, on such through traffic the east-side lines obtain a greater revenue (the full St. Louis-East St. Louis rate, undiminished by ab-

sorption of transfer or switching expense) than it would on the same traffic delivered locally in St. Louis. (R. 345, 347.)

This is illustrated by Exhibit No. 73, a statement of shipments from eastern points to Kansas, on which the St. Louis-East St. Louis combinations were equal. On each shipment the East St. Louis combination was applied, consequently the east-side line received and retained its full St. Louis-East St. Louis rate; and the west-side line was compelled to pay the transfer charge out of its factor. The testimony shows that on these shipments the east-side lines received $3,471.64; that the transfer charges (paid by the west-side lines) were $260.02, whereas had the same shipments been billed and delivered locally at St. Louis the transfer charges would have been paid by the east-side lines and therefore the net revenue would have been $3,-211.62, or about 7.4 per cent less than they actually received. (R. 345–347.)

There was much other evidence regarding the rates of both the east-side and west-side carriers directed to the opposing contentions that each group of carriers had adjusted their St. Louis-East St. Louis rates so as to compensate for the transfer expense. This evidence shows, in general, that, due principally to competitive conditions, the west-side lines extended their St. Louis rates to East St. Louis in the first instance without any increase to compensate them for the transfer expense which

they were thereby obliged to assume, and that the force of these competitive conditions have compelled a continuance of that original adjustment, while the east-side lines have been able to effect several increases in revenue to offset the transfer expense which they necessarily assumed when they equalized their St. Louis-East St. Louis rates. This evidence is here summarized.

Due to the competition of the Alton, the west-side lines extended their St. Louis rates to East St. Louis in the first instance without any increase. (R. 87–88; 254–257; 324.) Competition of the Cotton Belt, the Illinois Central, the Missouri Pacific, and the Burlington, as well as the Alton, each of which has a line which reaches East St. Louis from the east side, and which name the same rates from East St. Louis as from St. Louis, via other crossings, has compelled a continuance of the original adjustment, and has prevented the west-side lines from increasing their St. Louis-East St. Louis rates to an extent sufficient to cover the Association's transfer charges. (R. 354–358.) Action by State commissions and the Interstate Commerce Commission in rate cases has also exerted an influence upon the matter. (R. 235; 354–356.)

On the other hand, the evidence shows that when the east-side lines equalized their St. Louis-East St. Louis rates in 1908 they first increased their East St. Louis rates and then extended the increased rates to St. Louis. At the same time, sim-

ilar increases were made in their proportional rates to upper Mississippi River crossings, and these rates applied on traffic from all eastern points to the western territory, except on transcontinental traffic, a tremendous volume of through traffic, vastly larger than the St. Louis traffic. (R. 265–266; 342–343.) Further, in revising their rates under the authority of the Commission's order in *C. F. A. Class Scale Case,* 45 I. C. C. 254, the east-side lines added three miles to the actual East St. Louis mileage in computing their rates to St. Louis, this, of course, for the purpose of covering the expense of the river transfer. (R. 267, 273, 280.) The scale of distance rates there prescribed resulted in material increases. Before the revised rates were made effective they were further increased 15%, under the authority of *The Fifteen Per Cent Case,* 45 I. C. C. 303. (R. 342–348.)

It is evident that whenever the local rates of the east-side lines to St. Louis, thus increased to offset the transfer expense, were applied to through traffic, those lines received revenue for a service which they did not perform and for which they did not pay, but which was borne by the west-side lines.

The above is far from a complete statement of the evidence submitted to the Commission. It is, however, illustrative of the general character of the evidence and appears to be sufficient to indicate there was substantial evidence to support the Commission's order.

Proceedings in Court Below

On November 12, 1926, the 13 railroads, appellants herein, filed their bill in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to enjoin and set aside the Commission's order. (R. 1.) The United States was named as defendant. The Commission and the four west-side lines intervened as defendants. All defendants filed answers. (R. 59, 62, 65.) Final hearing was held before the three-judge court November 29, 1926. (R. 74.) December 8, 1926, the court entered its order dismissing the bill for want of equity. (R. 68.)

Appellants' Contentions

The various contentions of the appellants are reducible to two propositions, viz.,

I. That the Commission had no power to make the order.

II. That the order is not supported by substantial evidence.

ARGUMENT

SUMMARY

I. The order is within the power conferred upon the Commission. This court so held in *Terminal Railroad Asso.* v. *United States,* 266 U. S. 17.

II. The order is supported by substantial evidence. Evidence required by section 15 (6) of the Act in cases relating to divisions of joint rates was not necessary in this case, because the order does not prescribe divisions of joint rates. The

reasonableness of the level of the rates was not in issue and absence of evidence relating thereto does not affect the validity of the order.

I

The Order Is Within the Power Conferred Upon the Commission

The question whether the Commission has the power to make an order fixing liability for the transfer charges here under consideration is no longer open to debate, because that particular question was decided in the affirmative by this court in *Terminal R. R. Asso.* v. *United States,* 266 U. S. 17.

In August, 1920, the four west-side lines who were complainants before the Commission in the case at bar filed a petition and motion in the District Court of the United States for the Eastern District of Missouri to have the east-side lines and the Association adjudged guilty of contempt of court for violating the decree entered in pursuance of the mandate of this court in *United States* v. *St. Louis Terminal,* 224 U. S. 383 and 236 U. S. 194, a proceeding brought by the United States against the Association, the east- and west-side lines, which owned its capital stock, and certain others, alleging a combination in violation of the Sherman Anti-Trust Act.

The substance of the decree referred to is stated in the opinion of this court, 266 U. S. at pp. 23–25, as follows:

"1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Anti-Trust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing, and the like, and modifying its contracts as herein specified. An election having been made to continue the combination for terminal purposes, the defendants are therefore perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered. Provided, however, that the right of said Terminal Railroad Association as an accessory to its strictly terminal business to carry on transportation as to business exclu-

sively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same is hereby recognized, and nothing in this decree shall be construed to deny such rights."

" Paragraph 2 of the decree directs a reorganization of the contracts between the defendant railroad companies and the Terminal Association by providing for the admission of any railroad to joint ownership and control of the combined terminal properties on terms of equality with the then proprietary companies, and for the use of the terminal facilities by any railroad not a joint owner upon such terms as will, in respect of use, character, and cost of service, place every such railroad upon as nearly an equal plane as may be, with respect to expenses and charges, as that occupied by proprietary companies, and by eliminating from the existing agreement any provision which restricts any proprietary company to the use of the facilities of the Terminal Association.

" Paragraph 3 abolishes the practice of billing to East St. Louis or other junction points and then rebilling traffic destined to St. Louis or points beyond.

"Paragraph 4 abolishes any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area that is not equally applied in respect of traffic originating outside of that area.

"Paragraph 5 extends the effect of the decree to all railroad companies thereafter

admitted to ownership or use of the terminal facilities.

"Paragraph 6 is as follows: 'Nothing in this decree shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission.' "

The proceedings in the District Court in the contempt suit and the decree entered therein are stated at pp. 26–27 of the opinion of this court, as follows:

". . . The parties so complained of (appellants here) appeared and moved to dismiss the petition and also filed answer. An examiner was appointed, and, after the taking of evidence and a hearing, the court denied the motion to dismiss and entered its decree that the appellants 'have continuously since the entry of said final order and decree, in contempt of this court, violated the terms thereof and are still violating its said terms—

" '(a) In that defendants, the Terminal Railroad Association of St. Louis and its subsidiary companies are not acting in good faith as the impartial agents of the various proprietary lines.

" '(b) In that the proprietary lines other than the petitioners, through the domination

and control of the Board of Directors of defendant, the Terminal Railroad Association of St. Louis and its subsidiaries, compelled the petitioners to pay the Terminal Railroad Association its transfer charges for supplying and operating facilities for the interchange of both through east bound and through west bound freight traffic between the east-side lines and the west-side lines.

" '(e) In that the defendants [the east side lines above named] . . . have not paid and are not now paying the reasonable transfer charges of defendant, the Terminal Railroad Association of St. Louis and its subsidiary companies on west bound through freight to the rails' of the petitioners and other defendants whose lines enter St. Louis from the West. . . .

" And the decree commands that within 60 days the appellant companies cease violating the final decree in the respects above set forth, and that the east side lines ' be and they are hereby required to pay within 60 days after the amount of same shall have been ascertained and determined for the use and benefit of said west side lines . . . the total amount of the transfer charges of defendant Terminal Railroad Association of St. Louis and its subsidiary companies paid by said west side lines on west bound through freight of said east side lines to the rails of said west side lines at St. Louis, Missouri; from the date of the entry of said final decree, to wit; March 2, 1914, to the date of

this order . . .' And the decree prescribed and directed how such total amount should be determined."

It is obvious from the above quotations that the transfer charges referred to in the contempt proceedings were the same as those under consideration in the case at bar. That the controversy there was the same as here is shown by the following quotation from page 27 of this court's opinion:

> "The proceedings were instituted by the west side lines, not to vindicate the authority of the court, but to enforce rights claimed by them under the original decree. *The controversy is between them and the east-side lines as to whether the former or the later shall bear transfer charges on westbound through freight.*"

This court reversed the decree of the lower court, holding that the refusal of the east-side lines to pay the transfer charges was not a violation of the decree in the Anti-Trust suit.

This court further held that the subject matter of the suit, which obviously was the same as in the case at bar, was one within the jurisdiction of the Interstate Commerce Commission. In so holding this court said:

> " The making of rates is a legislative and not a judicial function. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 440; *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289; *Louisville & Nashville R. R. Co.* v. *Garrett*,

231 U. S. 298, 305; *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474, 483; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226. The division of joint rates is also legislative in character. The Interstate Commerce Commission is authorized to establish through routes and joint rates and to prescribe conditions upon which such routes shall be operated and to fix divisions of such rates among carriers. Section 15(1), (3), (6), Interstate Commerce Act, Section 418, c. 91, 41 Stat. 485, 486. It is well settled as a general rule that the question of the reasonableness of rates or of divisions of joint rates will not be considered by the courts before application has been made to the Commission. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Robinson* v. *Baltimore & Ohio R. R.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 254–261; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274. The Terminal Association and its subsidiaries are common carriers by railroad and, like the proprietary companies, are subject to regulation by the Commission. The original decree does not purport to regulate rates or prescribe divisions of joint rates, or fix liability for such transfer charges. On the other hand, it expressly provides that it shall not affect in any wise or at any time the power of the Commission over charges to be made by the Terminal Association or its

> subsidiaries, or any power conferred by law upon the Commission. In the exercise of its powers under existing law, the Commission is untrammeled by the decree and may make and regulate rates on through freight and the divisions thereof." (Ibid. 30–31.)

Examination of the transcript of record in that case shows that the evidence therein was largely the same as that adduced before the Commission in the case at bar. As here, there was a full explanation of the basis of making and applying rates through the St. Louis-East St. Louis gateway, and it was fully explained what traffic moved through that gateway on joint rates and what moved on the St. Louis-East St. Louis combinations. At pp. 440–441 of the record in that case (No. 425, October Term, 1923) is a comprehensive statement of the traffic which moved through that gateway on joint rates, followed by a statement which reads:

> "All of the foregoing traffic is covered by joint through rates. On all other traffic than that above described, the rates are made on combination of rates published separately to and from the Mississippi River. Such other traffic embracing that moving between points east of the Indiana-Illinois State Line, and Lake Michigan, upon the one hand, and all territory west of the Mississippi River, and on, and north of the Arkansas, Missouri, and Oklahoma-Kansas State Lines, including New Mexico and Arizona, but exclusive of Trans-Continental traffic, upon the other hand. As to this traffic where the rates make

upon the Mississippi River combinations, the current custom, and that heretofore followed has been to allow the lines east of East St. Louis their local rate. To the statement made in this paragraph, the following exception exists:

"A—The Burlington interchanges eastern traffic with western roads at St. Louis.

"B—In a comparatively few instances, the lowest combination of locals make on St. Louis, and not on East St. Louis; in such instances the eastern lines absorb the bridge tolls.

"C—On traffic moving between Illinois and Missouri points within a short radius east and west of St. Louis and East St. Louis, the rates make on the Mississippi River combination, with bridge tolls added."

See also pp. 265, 269, and 430 of that record.

In view of the facts in the case, it is evident that the holding of the court that the subject matter of the suit was within the jurisdiction of the Commission applies with equal force to instances in which the traffic moves on combination rates as to instances in which it moves on joint rates. No distinction was made in the opinion as between the two traffics. It follows, therefore, that the holding of this court was that the entire subject matter is within the jurisdiction of the Commission. After the decision of this court therein—rendered October 14, 1924—the west-side lines filed their complaint with the Commission.

Appellants concede that the Commission has jurisdiction under section 15(6) but contend that the order can not be sustained under that provision because of lack of evidence. This contention will be discussed under section II hereof. Appellants also contend that the subject matter of this suit "is not a 'practice' within the meaning of that word as used in the Interstate Commerce Act, but if it were a 'practice,' would be a practice not of the plaintiffs but of the West Side Lines * * *" We think it is clear that the practice was one within the contemplation of the Act and that the evidence shows it was a practice of the east-side lines.

Various provisions of the Act vest the Commission with jurisdiction over practices of carriers, viz., Section 1, par. (6), read in connection with par. (3), and Section 15, pars. (1) and (3), pertinent provisions of which read as follows:

> "Section 1 (6): It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce . . . just and reasonable regulations and *practices* affecting all . . . matters relating to or connected with the receiving, handling, *transporting,* storing, and *delivery* of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, *transportation,* and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classifi-

cation, regulation, and *practice* is prohibited and declared to be unlawful."

"(3) The term 'transportation' as used in this Act shall include . . . all services in connection with the receipt, delivery, . . . and *transfer in transit* . . . and handling of property transported."

"Section 15(1): That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, . . . the Commission shall be of opinion . . . that any individual or joint classification, regulation or *practice* whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable . . . or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe . . . what individual or joint classification, regulation, or *practice* is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, . . . and shall adopt the classification and shall conform to and observe the regulation or *practice* so prescribed."

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint . . . establish through routes, joint classifications, and joint rates, fares, or charges, applicable to

> the transportation of . . . property, . . . and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; . . . The Commission shall not, however, establish any through route, classification, or *practice,* or any rate, fare, or charge, between street electric passenger railways not connected in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or *practice,* or any rate, fare, or charge when the transportation is wholly by water. . . ." (Italics ours.)[1]

In the case at bar the east-side lines have followed a very definite practice for many years respecting all shipments interchanged by them with the west-side lines and passing through St. Louis and East St. Louis at combination rates made the same on both points, and that is, in each instance they have applied the East St. Louis combination and have refused to apply the St. Louis combination, to the

[1] The last sentence of this paragraph, prohibiting the Commission from establishing any *practice* as between certain types of carriers, is persuasive that in the absence of such a provision the Commission would have such power and infers that the Commission may establish *practices* as between other carriers not within the prohibition, an inference which is strengthened by the fact that this sentence was amended by Transportation Act, 1920, by the insertion of the word "*practice.*"

end that the transfer charge would not be included in the rate factor accruing to them and would be included in the west-side lines' factor. This practice was published by the east-side lines in the form of a provision in their tariffs which were posted and filed with the Commission. It was published in the tariffs of all the east-side carriers applying to and from St. Louis and East St. Louis. (R. 261.) In the language of Witness Sudborough, General Traffic Manager of the Pennsylvania System,

> "To make the point clear, the provision that I have read has the effect of preventing the use of the St. Louis combination in making rates where the East St. Louis combination is the same, that is, produces the same through rate that would be produced by the use of the St. Louis combination." (R. 262.)

This tariff provision was published in 1914 after the west-side lines had declined to pay the transfer charges on eastbound traffic, and its intended effect was to control the application of the rates so as to cast the burden of the transfer charges upon the west-side lines. (R. 343–344.)

Thus, the practice is one directly concerned with *the application of rates.* The Commission's order regulates the application of the existing rates; its effect is to require the application of the St. Louis combination on westbound through traffic, instead of the East St. Louis combination, to the end that the transfer charge will have to be paid by the east-side lines out of their rate factor to St. Louis.

Its further effect is to require the cancellation of the above-mentioned tariff provision of the east-side lines. The order does not change the present practice in respect of eastbound traffic, but on that traffic leaves the East St. Louis combination applicable; nor does it change the practice where the St. Louis combination is the lower, as in the case of traffic from eastern points to the 100-mile zone west of St. Louis.

As a result of this practice the west-side carriers were damaged, and they had the right to complain under section 13 (1) of the Act, which provides that any common carrier may complain to the Commission of anything done or omitted to be done by any common carrier in contravention of the provisions of the Act. *Penna. Co.* v. *United States,* 236 U. S. 351; *Chgo., Indpls. & Louisv. Ry. Co.* v. *United States,* 270 U. S. 287; *United States* v. *N. Y. Cent. R. R.,* 272 U. S. 457, 462.

We think that this practice, closely related as it is to the application of interstate rates of carriers subject to the provisions of the Act, is one within the contemplation of the provisions of the Act quoted above and within the jurisdiction of the Commission.

But the question of importance is not whether the subject matter is a "practice" but whether it is one within the power of the Commission under any provision of the Act. *Sou. Pac. Co.* v. *Interstate Commerce Com'n,* 200 U. S. 536, 556–557.

We think that the matter is within the control of the Commission under the comprehensive powers conferred upon it (1) to require extensions of lines, section 1 (21), *Railroad Commission of California* v. *Sou. Pac. Co.*, 264 U. S. 331, *Ala. & Vicksb. Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U. S. 244; *United States* v. *P. R. R. Co.*, 266 U. S. 191; (2) to control the matter of physical connections between main lines of railroads, section 1 (18) to (21), section 1 (4) and section 15 (3), *Ala. & Vicks. Ry. Co.* v. *Jack. & East. Ry. Co., supra;* (3) to establish through routes, section 15 (3), *United States* v. *Amer. Ry. Exp. Co.*, 265 U. S. 425, *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136; (4) to require carriers to make reasonable rules and regulations with respect to the operation of through routes, section 1 (4), *Cent. R. R. Co.* v. *United States*, 257 U. S. 247, 257; (5) to fix the terms and conditions under which through routes shall be operated, section 6 (13) and section 15 (3), *United States* v. *Amer. Ry. Exp. Co., supra, United States* v. *N. Y. Cent. R. R. Co.*, 272 U. S. 457, and, incidentally to fix the point of interchange of traffic as between carriers forming the through route, *Routing on Coal from Western Maryland Railway Mines*, 66 I. C. C. 103 and 74 I. C. C. 127, *Chgo. Mil. & St. P. Ry. Co.* v. *Un. Pac. R. R. Co.*, 88 I. C. C. 312; (6) to control the movement, exchange and interchange of cars used in the transportation of property and to enforce just and reasonable rules, regulations, and

practices with respect to car service, section 1 (10) to (17), *Peoria & Pekin Union Ry. Co.* v. *United States,* 263 U. S. 528, *United States* v. *Mich. Port. Cement Co.,* 270 U. S. 521, *Ala. & Vick.* v. *J. & E., supra;* (7) to require carriers to afford reasonable, proper, and equal facilities for the interchange of traffic, section 3 (3), *Chgo. Indpls. & Louisv. Ry. Co.* v. *United States,* 270 U. S. 287, *Penna. Co.* v. *United States,* 236 U. S. 351, *Louisv. & Nash. R. R.* v. *United States,* 238 U. S. 1, *United States* v. *P. R. R. Co.,* 266 U. S. 191.

Of special relevancy is the power to require carriers to make reasonable rules and regulations with respect to the operation of through routes, to fix the terms under which through routes shall be operated, and to fix the point of interchange of traffic as between carriers forming the through route. As previously stated, the east- and west-side lines maintain and operate through routes via the St. Louis gateway. By virtue of their joint ownership of the Association and their trackage rights over its rails, the routes of the east-side lines extend to St. Louis and those of the west-side lines to East St. Louis and consequently there is an overlapping of their routes between St. Louis and East St. Louis. In a real sense the question presented to the Commission was, In the operation of such an overlapping through route, what should be the point of interchange of the traffic, St. Louis or East

St. Louis? Would a reasonable rule or regulation with respect to the operation of such a through route require the east-side line to carry its traffic to the point of interchange with the west-side line in St. Louis, and, conversely, require the west-side line to carry its traffic to the point of interchange with the east-side line in East St. Louis?

As a matter of physical handling there have been two points of interchange, one in East St. Louis between the east-side line and the Association, the other in St. Louis between the Association and the west-side line, but East St. Louis has been considered the point of interchange as between the east- and west-side lines on through traffic in both directions because the west-side lines have borne the transfer charge on all such traffic. The west-side lines urged that under a reasonable rule or regulation with respect to the operation of the through routes the point of interchange of westbound traffic should be at St. Louis.

Under its power to fix the terms and conditions under which such a through route should be operated, the Commission would have authority to require that on westbound traffic the east-side line should take the traffic to the point of interchange with the west-side line in St. Louis. In effect, the order of the Commission requires this to be done; it requires that on westbound traffic the east-side carrier shall transport the traffic to the end of its line, St. Louis, and there interchange it with the west-

side line, or, what is equivalent, pay the transfer charge of the Association.[1]

The duty on the part of a common carrier, when it had received goods for transportation beyond the terminus of its line, to make delivery to the next succeeding carrier in the route, was recognized by the common law. *Myrick* v. *Michigan Central R. R. Co.*, 107 U. S. 102. The duty is now imposed by the Interstate Commerce Act. Under the decree in *United States* v. *St. Louis Terminal, supra,* the Association is enjoined from operating its properties otherwise than as terminal facilities for the railroads using the same—as their agent in performing the intermediate switching service in the terminal. When the east-side line delivers westbound traffic to the Association for transfer across the river, whether for delivery to a consignee in St. Louis or to a west-side carrier for further transportation, it engages the Association as its agent. *Missouri Pac.* v. *Reynolds-Davis,* 268 U. S., *supra.* In such case the only connection between the east-side line and the west-side line is in St. Louis. Therefore, it is the duty of the east-side line to make delivery to the west-side line in St. Louis, and it is its duty

[1] The fact that the through routes were already in existence by the voluntary act of the carriers, and that they were not established by the Commission, does not affect the power of the Commission to require reasonable rules and regulations with respect to the operation of them. *Central R. R. Co.* v. *United States*, 257 U. S. 247, 257–258; cf. *United States* v. *N. Y. Central R. R.*, 272 U. S. 457.

to pay its agent for the transfer service which it performs for it.

Of course, under section 15 (6) the Commission has power to fix the divisions of joint rates. Therefore, in respect of traffic moving on joint rates, it could, upon proper evidence, have fixed liability for the transfer charges by adjusting the divisions as between the east- and west-side lines. This it did not do, but confined its order to traffic moving on the Mississippi River combination. It would not seem to be a reasonable or logical construction of the Interstate Commerce Act that the Commission would have power to decide which of the two groups of carriers should bear the transfer expense in instances where the traffic moves on joint rates and would lack that power in instances where the traffic moves on combination rates. This court said plainly in *Terminal R. R. Assn.* v. *United States, supra,* that the Commission has power over the subject matter of the transfer charges under pars. (1), (3), and (6) of section 15. The Commission's power over divisions of joint rates, including the power to make an order, is complete under par. (6) of section 15. If the court had been referring only to divisions of joint rates, reference to pars. (1) and (3) of section 15 would have been surplusage. The language of the court is:

> "The Interstate Commerce Commission is authorized to establish through routes and joint rates and to prescribe the terms

> and conditions upon which such routes shall be operated and to fix divisions of such rates among carriers. Section 15 (1), (3), (6), Interstate Commerce Act." (*Ibid.* 31.)

On the same page, the court pointed out that the original decree did not purport to (1), regulate rates or (2) prescribe divisions of joint rates, or (3) fix liability for such transfer charges. "*On the other hand,*" the opinion continues, "it expressly provides that it shall not affect in any wise or at any time the power of the Commission over charges to be made by the Terminal Association or its subsidiaries, or any power conferred by law upon the Commission."

It seems that the language above quoted must be construed as saying that where joint rates are in effect the Commission can control the question as to what group of carriers shall bear the transfer expense by fixing the divisions of the joint rates under section 15 (6); and where combination rates are applicable, the Commission can control that question under section 15 (1) or (3) or (1) and (3).

II

The Order Is Supported By Substantial Evidence

We have hereinbefore referred to some of the important evidence adduced before the Commission. The evidence fully supports all the facts found by the Commission; and this is not denied. The evidence was ample to support the order.

Evidence required by section 15 (6) of the act in cases relating to divisions of joint rates was not necessary in this case because the order does not prescribe divisions of joint rates

Section 15(6) requires that in "prescribing and determining the divisions of joint rates," the Commission shall give due consideration to certain specified matters, such as the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, etc., " and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge."

Appellants assert there was no evidence upon these matters and therefore the order is void. But this provision has no application to the case at bar, because the order does not prescribe divisions of joint rates. The order has no reference to joint rates and no application whatever to traffic moving on joint rates. On the contrary, it unmistakably applies only to traffic moving on combination rates. These combination rates are through rates—that is, they are combinations of separately established rates applied to through transportation—but they are not *joint* rates. The distinction between joint rates, on the one hand, and through rates made by combining separately established rates, on the other hand, is clear, and has often been noted by this court. (St. *Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136, 139, note 2; *Central R. R. Co.* v. *United States,*

257 U. S. 247, 258; *Virginian Ry.* v. *United States,* 272 U. S. 658, 666.) If there were any doubt as to the meaning of the term "joint rates" as used in section 15(6), it could easily be resolved by reference to other provisions of the Act, especially section 6(1) which reads in part as follows:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation."

It follows indubitably that section 15 (6) has reference only to *joint rates* and not to separately established rates applied to through transportation. The through rates in question being made on the Mississippi River combination, there is, of course, no occasion for and no possibility of the Commission fixing "divisions" of them as between the east-side and west-side carriers, for each necessarily receives its separately established rate to or

from the river. For these reasons, the absence of evidence upon the matters refered to in section 15 (6) would have no effect upon the validity of this order. Compare *New England Divisions Case,* 261 U. S. 184; *United States* v. *Abilene & So. Ry. Co.,* 265 U. S. 274; *Brimstone R. R. & Canal Co.* v. *United States,* — U. S. —, decided Feb. 20, 1928.

The reasonableness of the level of the rates was not in issue and absence of evidence relating thereto does not affect the validity of the order

It is further contended that there should have been a showing of the services performed by the east-side carriers as compared with those performed by the west-side carriers under their respective rates, including evidence of distances and the like. But such evidence would not have contributed to a decision of the issue presented, and was unnecessary as a matter of law, in view of the showing that the rates of both groups of carriers applied to both St. Louis and East St. Louis, and that, therefore, the rates of both groups of carriers included the transfer services. Stated differently, the rates of the east-side lines to St. Louis included the transportation service to St. Louis and delivery in St. Louis, and under those rates, when applied to local St. Louis traffic, the east-side lines paid and bore the transfer expense, that expense being included in their rates. Likewise, the rates of the west-side lines from East St. Louis included the transfer expense. Hence, in the case of through shipments moving on the St. Louis-East St. Louis

combination, the situation is presented of a two-factor combination, either factor of which, if applied separately, would include the transfer charge. In determining which carrier, under these circumstances, should pay the transfer charge, there would be no necessity of considering the measure of those rates. Raising or lowering the St. Louis-East St. Louis rates of either group of carriers would not affect the question at issue, i. e., which of the two groups of carriers should bear the transfer charges on through shipments.

Under these circumstances it was not necessary that the Commission have before it evidence bearing on the question of the reasonableness of the rates, and even if there was a total absence of such evidence, which we do not concede, the validity of this order would not be affected. The order, as previously explained, relates to the application of existing rates and does not raise or lower the level of those rates. If as a result of the Commission's requirement that they pay the transfer charges on westbound traffic, the revenues of the east-side lines should be impaired, they are at liberty to propose readjustments of their rates, subject of course, to review by the Commission.

The evidence shows, it may be added, that the east-side lines, as a group, are in a more prosperous financial condition than the west-side lines (Ex. 77), and therefore they are better able to bear the burden of these transfer charges, which burden is rightfully theirs, than the west-side lines.

CONCLUSION

We respectfully submit that the decree of the District Court should be affirmed.

J. STANLEY PAYNE,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 404.

The Baltimore & Ohio Railroad Company; William W. Wheelock and William G. Bierd, Receivers of the Chicago & Alton Railroad Company; Chicago & Eastern Illinois Railroad Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Illinois Traction, Inc.; Illinois Central Railroad Company; Litchfield & Madison Railway Company; Louisville & Nashville Railroad Company; Mobile & Ohio Railroad Company; The New York, Chicago & St. Louis Railroad Company; the Pennsylvania Railroad Company; Southern Railroad Company, and Wabash Railway Company,

Appellants,

vs.

The United States of America, The Interstate Commerce Commission; The Chicago, Rock Island & Pacific Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company, and St. Louis-San Francisco Railway Company,

Appellees.

BRIEF FOR WESTERN CARRIERS, APPELLEES.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OCTOBER TERM, 1927.

No. 404.

The Baltimore & Ohio Railroad Company; William W. Wheelock and William G. Bierd, Receivers of the Chicago & Alton Railroad Company; Chicago & Eastern Illinois Railroad Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Illinois Traction, Inc.; Illinois Central Railroad Company; Litchfield & Madison Railway Company; Louisville & Nashville Railroad Company; Mobile & Ohio Railroad Company; The New York, Chicago & St. Louis Railroad Company; the Pennsylvania Railroad Company; Southern Railroad Company, and Wabash Railway Company,

Appellants,

vs.

The United States of America, The Interstate Commerce Commission; The Chicago, Rock Island & Pacific Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company, and St. Louis-San Francisco Railway Company,

Appellees.

BRIEF FOR WESTERN CARRIERS, APPELLEES.

I.

Succinct and Accurate Summary of Salient Facts in Record and Resume of Contentions of West and East-side Lines With Respect Thereto.

This brief is filed by the Appellees who were complainants in the proceeding before the Interstate Com-

merce Commission and they will be hereinafter referred to as the west side lines.

A tremendous amount of through trans-river traffic, carload as well as less-than-carload, is interchanged between the east and the west-side lines in the St. Louis-East St. Louis switching district; for the mileage of the carriers entering that gateway from all directions is 80,000, or about 30 per cent of the entire mileage in the United States (Ex. No. 4, p. 6).[1] The interchange facilities, therefore, provided (the Terminal Railroad Association of St. Louis and its subsidiary companies) are large, valuable and extremely expensive to maintain. The Terminal's[2] investment in road and equipment and improvements on leased properties in 1924 amounted to $45,463,369.45 (Ex. No. 80, p. 5). Its capital (stock and funded debt) amounted to $48,848,100.00. It operates 372.35 miles of track *solely in switching and terminal service* (Ex. No. 80, pp. 1, 7; Ex. No. 58, pp. 3, 13, 21). Its properties, including two bridges across the Mississippi River, are operated as one comprehensive terminal facility performing terminal and interchange service for the twenty-eight lines with which it connects. It has over 6,000 employees (Control of Subsidiaries by Terminal R. Ass'n, 99 I. C. C. 698). Its operating expenses for the year 1924 amounted to $9,096,413.70 (Ex. No. 80, p. 6) It interchanged with its connections during 1924 a total of 3,883,116 cars, or more than 10,000 cars a day. (Control of Subsidiaries by Terminal R. Ass'n, 99 I. C. C. 698.) The distance between St. Louis and East St. Louis across the Mississippi River is usually

[1] The exhibits referred to in this brief are those introduced in the hearing before the Interstate Commerce Commission or filed thereafter by agreement of parties.

[2] When we refer to the Terminal herein the subsidiary operating companies are included.

figured on a three-mile basis (St. Louis Chamber of Commerce v. Dir. Gen., 74 I. C. C. 308, l. c. 310). The through trans-river freight traffic involved herein is interchanged *in switching service* (Ex. No. 58, pp. 3, 13, 21).[3] Some of the less than-carload through traffic is interchanged by certain transfer companies (Ex. No. 52, pp. 1, 2).

Prior to the order of the Interstate Commerce Commission (Rec. 27-29), the four west side lines, Appellees herein, were exclusively saddled with the continuous duty of producing the large and heavy operating expenses (Rec. 288, lines 31-35) of the Terminal in interchanging this through trans-river traffic with their eastern road-haul connections. It involved an annual expense of approximately $3,000,000 to these *four* west side lines and the *thirteen* east side trunk lines *shared no part of the burden* and *bore no part of the expense.* Based upon a test period of 28 months on westbound, and 17 months on eastbound traffic, the *eastbound* through traffic constituted 71 per cent and the westbound traffic 29 per cent, of the total interchanged in *both* directions. The east side lines, therefore, receive about three times more traffic than they give to the west side lines. If the transfer charges, during *one year* embraced within the foregoing period,

[3]Under the decree of the United States District Court the Association was permitted to exist and continue "as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and modifying its contracts as herein specified" (Ex. No. 50, p. 2). The proprietary companies were enjoined "from in anywise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered" (Ex. No. 50, p. 2).

had been borne by the east side lines on westbound traffic, and by the west side lines on eastbound traffic, the thirteen eastern carriers combined would only have paid $713,161.69, while the west side lines would have paid $1,746,016.55. These figures included carload but not l. c. l. traffic (113 I. C. C. 681, l. c. 682, 3rd Par.; Frisco's Ex. No. 52; Rock Island's Ex. No. 53; Missouri Pacific's Ex. No. 55; Katy's Ex. No. 56). However, the Commission's order involved here covers only that part of the westbound through traffic moving on a combination of locals and a subsequent order covering westbound traffic moving under joint rates undoubtedly largely depends upon the decision of this Court in this case (113 I. C. C. 681, l. c. 690, 3rd Par.); so that, as a result of this long-continued litigation, if the west side lines are accorded the legal redress to which they are entitled, and which they are asking for (the assumption of the burden of interchange by the *east* side lines on *westbound* traffic *only*) the four western roads will still be assuming the burden and expense of interchanging approximately 71 per cent of the total traffic, and the remaining 29 per cent of the total traffic will be borne by the thirteen east side trunk lines as they participate in the movement. The Appellants contend that they should not even b compelled to assume the burden and bear the expense of this comparatively small amount of the total, notwithstanding the fact that during the year 1924 their railway operating revenues and their net railway operating income averaged $32,593 and $4,944, respectively, per mile of road, while the same revenues and income for the four west side lines averaged only $16,900 and $2,826, respectively, per mile of road (Press' Ex. No. 77; Rec. 387).

Furthermore, the east side lines since 1906 have assumed the burden and expense of delivering traffic consigned to St. Louis *proper,* including all freight to industries on the rails of these west side lines in the St. Louis switching district, but from 1906 to the effective date of the order herein in 1926 they persistently refused to so deliver traffic consigned to points *beyond* St. Louis, although their rates on the traffic destined beyond St. Louis, are exactly the same as their rates on traffic consigned locally to St. Louis. In 1906 when the east side lines recognized St. Louis and East St. Louis as one community, entitled to the same rates and the same services of delivery and transfer, they increased their East St. Louis rates from 116 to 117 per cent, and applied the East St. Louis rates thus increased to St. Louis. From that time on, they absorbed the transfer charges on traffic consigned to or from St. Louis proper. However they applied *these increased rates* not only to the local traffic but also to the *traffic involved herein* and moving to points beyond St. Louis but refused to assume the same burden and expense of delivery with reference thereto that they assumed on local St. Louis traffic. No explanation whatever was made in the record by the east side lines as to why they applied the increased rates in 1906 to the traffic consigned to points beyond St. Louis which is many, many times more than the local St. Louis traffic, and then refused to perform thereon the same service that they did on freight for St. Louis proper. They continued to compel the west side lines to receive the traffic going beyond St. Louis at East St. Louis, notwithstanding the fact that their East St. Louis rates were increased. No law justified such action except the law that might makes right and the fact

that there are thirteen trunk lines on the east side and four trunk lines on the west side with equal representation on the board of directors of the Terminal Railroad Association. The eastern carriers have thereby perpetuated this unjust burden on the western carriers long after the *initial cause* which compelled the west side lines to absorb the charges in both directions *had lost all its force,* for in 1877 when the west side lines were forced through the compulsion of competition to meet the action of the Chicago and Alton by absorbing the transfer in both directions, the railroads themselves controlled the routing of traffic and there was no interchange and terminal facility serving both the *west* and the *east* banks of the River and jointly owned, controlled and used by the east and the west side lines with supposedly equal rights, benefits and burdens.

The rates of the east side lines to St. Louis—East St. Louis have received a series of increases since 1906 and they are today approximately and on the average *100 per cent higher* (Appendix A, *infra;* Exhibit No. 72), so that the volume and measure of their rates are, according to the undisputed data in this record, ample and adequate for them to participate reciprocally as the law requires them to do in the burden and expense of interchanging through traffic with their western road-haul connections.

The legal issues and contentions of the respective parties.

The ultimate legal question involved herein is whether the Commission has the power under the Act

(a) to adjudicate and order the *precise point of* interchange or *delivery* between road-haul carriers in handling through freight,

(b) to compel carriers to share and participate in the burden and expense of interchanging through road-haul traffic, and

(c) to order carriers to furnish the facilities for through routes on traffic destined to points beyond their own rails.

The Commission's order requires the east side lines to share in the burden and expense of interchanging such through traffic involved by compelling them to absorb the transfer or switching charges of the joint agencies in *one* direction *only* and thereby deliver westbound through traffic on the west bank of the river (St. Louis).

Appellants contend that this order is invalid because:

(a) The former method of interchanging and delivering through freight by which the west side lines assumed the burden and expense of interchanging and delivering in both directions, did not constitute a "practice" within the meaning of the Act, and

(b) That the Commission cannot either compel a carrier to make a lawful and proper delivery as a part of its road-haul duties, or participate in the burden and expense of interchanging through traffic upon which it enjoys road-haul revenue, unless the complainant also raises an issue as to

the level, measure or volume of the rates and divisions under which such traffic happens to move.

Appellees contend that these legal issues so raised are without merit because:

(a) The order of the Commission herein is a valid and lawful exercise of its power under those provisions of the act *which do not relate to practices*. It is, therefore, immaterial whether the interchange arrangements condemned and corrected, constitute a "practice" within the meaning of that term as used in certain *other* provisions of the act. The provisions of the Act not relating to practices relied upon by Appellees before the commission are hereinafter discussed. (Chapter VII, *infra.*)

(b) The Commission can compel a carrier to perform such *services* and incur such *expenses* as are a part and parcel of its road haul transportation duties under *existing* rates, such as making a *delivery* of through traffic to its road haul connections and participating *reciprocally* in the burden and expense of interchanging freight, without considering rates and divisions; because the obligation of a carrier under its line-haul rates *includes such services* and expenses, irrespective of the *measure, volume or level* of the *line-haul rates*. The carrier is thereby simply fulfilling the law's requirements as to *service* under *those rates*. (Chapter III, *infra.*)

(c) That the provisions of the Act relied upon by Appellees (paragraphs (3), (4), (6), (10), and (11) of Section 1, paragraphs (1) and (5) of

Section 3, and paragraphs (1) and (3) of Section 15 of the Act) may be enforced without a concurrent issue being raised under paragraph (6) of Section 15 of the Act relating to divisions; because the former are distinct, separable and independent of the provisions relating to rates and divisions. (Chapter III, *infra*.)

(d) That even if complainants before the Commission were required to raise an issue as to the level or measure of the rates and divisions in connection with the enforcement of duties that are inherently a part of a carrier's obligation under *existing* line-haul rates, maximum or minimum, to wit, proper and lawful delivery, the east side lines are foreclosed and estopped from raising such a question for the reason that they formally tendered in their answers before the Commission an issue as to rates and divisions as an affirmative defense to the complaint (Chapter V, *infra*).

Having thus attempted to state tersely the legal questions raised and the contention of the parties with reference thereto, we will now endeavor to briefly summarize the pertinent facts of record. Having in mind the issues as aforesaid, the relevancy of the facts hereinafter set forth will be readily grasped.

Force of competition compelled west side lines to assume burden of transfer in both directions without compensation therefor.

For many years after the entrance of railroads into St. Louis and East St. Louis, the shippers paid the river transfer charges on through and local traffic in

both directions (Ex. No. 5, p. 92). When the Chicago and Alton completed its line from East St. Louis to Kansas City, Missouri, over the Mississippi River at Louisiana, Missouri, in 1877, it accepted westbound traffic from, and delivered eastbound traffic to, the east-side lines at East St. Louis. In order to participate in the business, the west-side lines *were forced to take similar action.* They, in turn, accepted westbound traffic from, and delivered eastbound traffic to, the east-side lines at East St. Louis by absorbing the transfer or bridge charges on through trans-river traffic in both directions. When the west-side lines so assumed the burden and expense of performing the interchange service between the west and east bank of the river in both directions, they did so *without any increase* or inflation *in their rates* to compensate them for the additional service.

Said Mr. Maxwell, Vice-President of the Wabash, and a leading witness for the east-side lines (Rec. 274):

> "In 1877 when the Chicago & Alton completed its bridge at Louisiana, Missouri, it entered the traffic between St. Louis and the west via Louisiana, thus establishing *the St. Louis rates* between East St. Louis and points west of St. Louis, with the exception of a small portion of nearby territory west of the Mississippi River. All other western roads at St. Louis voluntarily met the action of the Chicago & Alton, and thus established between East St. Louis and all points west the St. Louis basis of rates, *which basis is still in effect.* * * * Conditions as to the western roads under which St. Louis rates were made voluntarily by them from East St. Louis have also remained *unchanged to this day.*"

Under the compulsion of competition, therefore, East St. Louis became the point of interchange between the two sets of carriers. It has continued to be the point of interchange on such through trans-river traffic to the effective date of the order of the Commission herein. It is this practice which the Appellees sought to have reformed because of the radically changed conditions at the St. Louis-East St. Louis terminal. Having become the point of interchange, it thereby became the rate-breaking point between the east and the west-side lines for which the west-side lines received no additional compensation, because they merely extended their rates to East St. Louis without any increase or inflation therein to cover the additional service. The west-side lines concede that as to eastbound through trans-river traffic the point of interchange of delivery should remain at East St. Louis because by virtue of their joint ownership and control of the Terminal, their rails terminate there. On the other hand, the west-side lines contend that the point of interchange as to the westbound through trans-river traffic should properly be at St. Louis, Missouri, where the rails of the east-side lines, by virtue of their control, ownership or use of the Terminal, terminate.

Radically changed conditions at St. Louis since west side lines first assumed burden of delivery in both directions.

When the practice of interchanging freight in both directions on the east bank of the river was initiated in 1877 and for many years thereafter, the east-side lines had no freight terminals in St. Louis; but in 1889 the first radical change in the relationship of the east and west-side lines took place when they jointly executed

a contract creating the Terminal Railroad Association. Through their ownership, control and perpetual right to the joint use of the bridges, rails and all other facilities of the Terminal, *the east-side lines then and thereby acquired freight terminals in St. Louis, Missouri.*[4] The Terminal was created and organized for the purpose of securing to all the railroads entering St. Louis and East St. Louis an efficient and economical method of interchanging passenger and freight traffic at the points named (Ex. No. 51, pp. 6, 28), and to furnish to all the proprietary and nonproprietary carriers adequate terminal facilities in St. Louis and East St. Louis (Ex. No. 51, pp. 15, 141). The Terminal is a cooperative enterprise (Ex. No. 4) owned and controlled, or used and enjoyed *jointly* by all of the east and west-side lines in common. Its fixed charges are guaranteed by all of the owners and they are pledged to make up any deficit in its operating expenses. The Terminal is the St. Louis terminal of all the east-side lines. Likewise, it is the east-side terminal of all the

[4] The contract of October 1, 1889, between the proprietary companies and the Terminal Association recites that the Association, at the instance and request of the proprietary companies had obtained the property of other terminal companies in both St. Louis and East St. Louis, "to the end that such properties may be held in perpetuity as a unit, and developed and improved in the interest of the proprietary companies for the purpose of furnishing adequate terminal facilities in St. Louis and East St. Louis; and, whereas, the several proprietary companies do now wish to secure in proper form and in perpetuity a right to use said terminal properties of the first party now held and hereafter to be acquired. Therefore, it is agreed between the parties as follows: In consideration of the covenants and payments hereinafter stipulated to be performed and paid by the proprietary companies, severally, but not jointly, the first party hereby grants to each of the proprietary companies, its successors and assigns, forever, a right of joint use with each other and with such other companies as may be admitted as proprietary lines to joint use thereof, of all said terminal properties of the first party now held or that may hereafter be acquired in St. Louis, Missouri, and East St. Louis, Illinois, including herein the St. Louis bridge and tunnel for passenger and freight, express and mail business and for interchange of the same between each other and with the public" (Ex. No. 51, pp. 14, 15).

west-side lines. Every trunk line carrier entering the St. Louis-East St. Louis switching district on either side is either a joint owner of, or uses, and has the perpetual right to use as an "appurtenant" to its own railroad, all of the rails and facilities of the Terminal in St. Louis as well as in East St. Louis for the interchange of freight traffic (Ex. No. 51, pp. 15, 80, 139-141; Ex. No. 50, pp. 5, 6).

Under the contract of 1889 between the east and the west-side lines creating the Terminal Railroad Association, as amended in 1914, (Ex. No. 51, pp. 136-145), all of the proprietary and using companies have the right in perpetuity to the joint use of all of the terminal facilities of the Terminal for the interchange of freight and passenger traffic "between each other" (Ex. No. 51, p. 15). The joint use so granted to all of the proprietary and using companies is to "remain as an appurtenant to the railroad" owned by each of the proprietary and using companies (Ex. No. 51, pp. 15, 80, 140, 141; Ex. No. 50, p. 6). The contract as amended also provides that every proprietary company shall have "equal rights of joint ownership and control of the combined terminal facilities of said Association upon such just and reasonable terms as shall place such applying company upon a *plane of equality* in respect of benefits and *burdens* of the parties hereto (Ex. No. 51, pp. 139, 141; Ex. No. 51, p. 5). The contract as amended further prescribes that any carrier not electing to become "a joint owner," but desiring the use of the terminal facilities of the Terminal, "may enjoy the use thereof upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place it upon as nearly an equal plane as may be, with respect to expenses and

charges, as that occupied by the proprietary companies (Ex. No. 51, p. 140). The decree of the United States District Court entered pursuant to the decision of the United States Supreme Court in the Terminal Railroad case (224 U. S. 383, 236 U. S. 194) orders that all of the provisions of the decree shall extend to and embrace all railroad companies now or hereafter admitted to joint ownership or use of the facilities of the Terminal Railroad Association and to all its facilities present and future acquired (Ex. No. 50, p. 6). The amended contract entered into pursuant thereto further states that the benefits and burdens of the agreement shall inure to and rest upon all future proprietary and using companies, respectively (Ex. No. 51, p. 141). The Terminal, therefore, is today the St. Louis terminal of all of the east-side lines (Ex. No. 4, p. 21). Its rails are "properly regarded as the individual terminals of each of the *constituent lines*" (Swift & Co. v. Dir. Gen., 56 I. C. C. 309, l. c. 312). The Terminal "constitutes the united terminals of all the trunk lines entering the city" (Manufacturers Ry. Co. v. St. L. I. M. & S. Ry. Co., 28 I. C. C. 93, l. c. 105).

Rates of east side lines on traffic involved herein raised when they entered St. Louis.

Another radical change in the relationship of the east and the west-side lines with respect to the St. Louis-East St. Louis terminals took place in 1905 and ending in 1908, when the east-side lines publicly recognized that their rails *for all purposes* (except that of interchanging through trans-river traffic) reached St. Louis, Missouri. Although the east-side lines acquired freight terminals in St. Louis, Missouri, through

their ownership, control and perpetual right to the use of the facilities of the Terminal in 1889, they clung tenaciously for years thereafter to the fiction that they had no such terminals and that their rails and terminals ended at East St. Louis. For sixteen years they pretended not to see what everybody else saw. Finally, in 1905, they capitulated. Up to that time they contended they had no terminals west of the river, and, therefore, refused to deliver traffic destined locally to St. Louis by absorbing or paying the switching charge of the Terminal (Rec., p. 38). Having in 1905 recognized St. Louis as a station on their lines for the acceptance and delivery of local traffic, the east-side lines "laid themselves under the obligation of receiving traffic for through movements to and from that point (St. Louis) under through bills of lading" (St. Louis Terminal Case, 34 I. C. C. 453, l. c. 456). St. Louis and East St. Louis were, therefore, placed upon the same basis with the same rates from trunk line territory (Class and Commodity Rates, 32 I. C. C. 471, l. c. 475). Incidentally, when they recognized their duty to accept local outbound traffic at St. Louis and to deliver local inbound traffic at St. Louis, they raised their rates to East St. Louis to the 117 per cent basis (Rec., p. 342) and applied the same basis of rates to St. Louis. In addition they also applied and do now apply the *increased East St. Louis rates to the relatively greater amount of traffic involved herein*, that is, traffic destined to and from points beyond St. Louis (Rec., pp. 367, 342; Ex. No. 49, p. 56).

Concerning the effect of the foregoing adjustment, this Commission said (Business Men's League of St. Louis v. A. T. & S. F. Ry., 44 I. C. C. 308, l. c. 311):

> "By this readjustment St. Louis, Missouri, East St. Louis, Madison and Granite City, Illinois, were treated as one community."

Concerning its effect, we also quote from an exhibit introduced by Mr. W. C. Maxwell, vice-president of the Wabash and one of the witnesses for the eastern lines herein (Ex. No. 59, p. 23):

> "This adjustment means that, so far as freight traffic is concerned, East St. Louis, Madison and Granite City will be merely divisions of St. Louis, just as North St. Louis, South St. Louis and Carondelet are divisions of St. Louis. It means that St. Louis will be the freight rate basing point, not only for business between the East, but *between the East and most of the vast territory west of the Mississippi River*" (Fourth Report of Municipal Bridge and Terminal Commission).

By reason of the readjustment described in the foregoing paragraph, we have this wholly unjustifiable situation at St. Louis-East St. Louis today:

The east-side lines furnish the facilities for and operate through routes to and from St. Louis, Missouri, on local traffic, but they refuse to furnish the facilities for and to operate through routes to St. Louis on traffic destined beyond, although their rates to the two towns are exactly alike. They will deliver the traffic consigned to a shipper at St. Louis by absorbing the transfer charges; but on traffic consigned to a point *beyond* St. Louis, they deliver it to the west-side lines at East St. Louis. They give and perform *less service* on traffic to a point *beyond* St. Louis than they do on traffic consigned to and delivered at St. Louis under exactly the same rates. It is the conten-

tion of the west-side lines that they should make the *same delivery* to the west-side lines at St. Louis that they make to the shippers at St. Louis; for their compensation in both cases is alike.

Admissions of executives of east side lines that present practice is unfair.

Immediately after this readjustment in 1905 the west-side carriers requested the east-side lines to readjust the interchange of through traffic (Rec., p. 393-405). In response to the changed situation, a traffic executive of one of the eastern lines (Mr. George H. Ross, vice-president and general traffic manager of the Toledo, St. Louis & Western R. R. Co., now a part of The New York, Chicago and St. Louis R. R. Co., one of the appellants herein), wrote to Mr. W. B. Biddle, third vice-president of the Rock Island System, the following letter in which he stated that, in his opinion, it would be "eminently fair" for the receiving line to absorb the bridge charges on through traffic routed via the St. Louis gateway in either direction (Ex. No. 9):

"Toledo, St. Louis & Western Railroad Company.

Toledo, Ohio, December 13, 1905.

"Mr. W. B. Biddle,

Third Vice-President, Rock Island System,
Chicago.

"Dear Sir:

"I enclose herewith a memorandum in regard to carrying out an understanding with the Municipal Bridge and Terminal Commission of St. Louis in relation to bridge tolls at St. Louis on St. Louis traffic, in which you will note it was recommended

that St. Louis rates be made as per the figures stated in the memorandum attached.

"I beg to advise that at a meeting held today by the Central Freight Association lines the subject matter was fully approved and a committee was instituted to take the matter up with the Trunk Lines, New England lines and the Canadian lines, and get their concurrence; in all probability, the subject will go through as stated in the memorandum.

"This now brings to my mind very prominently the question of absorption of bridge tolls on *through* traffic; as, for instance, traffic from Missouri River points destined to any point on our line of road, or, so far as that is concerned, to any Eastern point, Trunk Line, New England, Canadian or Central Freight Association.

"There should be, in my opinion, some understanding existing as between the lines west of St. Louis and the lines east of St. Louis on through traffic routed via the St. Louis gateway in either direction; as, for instance, any traffic that the Clover Leaf Road delivers to your line, through the Terminal Association, your line would absorb the bridge tolls as published, and, in a like manner, any traffic which your line delivers to the Clover Leaf, we would absorb the bridge charges.

"*This seems to me to be fair, and* furthermore, it seems to me of necessity to have an understanding, and I would like very much to have you bring this matter up in the proper way before the Western Trunk Line Committee, so that the subject may reach the constituted committee of the Eastern roads, *i.e.*, the Central Freight Association.

"You understand that at the present time the Western roads absorb the bridge tolls in both directions; this by reason of their making rates to and from St. Louis and East St. Louis the same, and I assume that you would like to get out of some of this disability in the manner stated by me,

which appears, by studying into the situation, to be eminently fair.

"Will you kindly favor me with your views in this matter and if you are disposed to take the matter up in the manner suggested by me?

Yours truly,

(Signed) GEO. H. ROSS,
2nd V. P. & G. T. M.

Copy to

J. W. BLABON, F. T. M., C. & A. Ry.
D. MILLER, 1st V. P., C. B. & Q. Ry. Co."

The Chicago, Burlington & Quincy Railway Company also operates a line on the east side of the river. On April 7, 1908, Mr. George H. Crosby, freight traffic manager of that railroad, wrote, in part, to Mr. W. B. Biddle, vice-president of the Frisco Lines, as follows (Ex. No. 5):

"I think this whole question of transfer between St. Louis and East St. Louis should be disposed of on an equitable basis. As the matter stands today the western line pays the transfer on *both* eastern and western business, *which is manifestly unfair,* and we are ready to cooperate with the other interested lines in bringing about a reformation in this respect."

At a meeting of the representatives of the east and west side lines, held at St. Louis on June 25, 1908, the following recommendation was unanimously adopted (Mr. Maxwell's Ex. No. 59, p. 34):

"Recommended, That a subcommittee of three be appointed by the east-side lines to confer with a similar committee to be appointed by the west-side

> lines, to recommend a method of settlement of the question of disposition of, or dividing the bridge toll and switching between St. Louis and East St. Louis on through traffic moving in either direction via East St. Louis to and from points, both of which are outside of the limits of St. Louis and East St. Louis. Said joint committee to report to an adjourned meeting of this general committee as soon as possible."

At a meeting of the representatives of all the east and west-side lines, held on September 28, 1914, the following resolution was submitted by representatives of the western lines:

> "In order that the cost of interchange between eastern and western lines at St. Louis and East St. Louis may be equitably divided, it is agreed by the parties here represented that on and after this date the expense of bridge and ferry tolls, or charges, of other transportation companies, between St. Louis and East St. Louis, shall be paid by the line receiving the traffic."

Upon a vote the resolution was defeated, five votes being cast in favor of, and twelve opposed to, its passage (Mr. Maxwell's Ex. No. 59, p. 39).

The futile and persistent efforts of the west-side lines during the last twenty years to change the existing practice of interchange and to require the east-side lines to bear a fair share of the burdens thereof, is graphically described in the record (Ex. No. 5). The controversy was carried to the courts where it remained for several years. (Terminal Railroad Association v. United States, 266 U. S. 117.)

Today the east-side lines interchange passengers with the west-side lines at St. Louis. They inter-

change mail with the west-side lines at St. Louis. They interchange express traffic with the west-side lines at St. Louis (Rec., 200-202).

Carriers generally recognize obligation to participate in expense and burden of interchange.

The record further shows that under the generally recognized custom and obligation among carriers pursuant to the code of car-service rules published by the American Railway Association, the *delivering line assumes the burden of making delivery* in the yard of and on the designated tracks therein for the receipted traffic of the receiving line either by direct delivery with the power of the delivering line, or by using an intermediate switching line to act as its agent in effecting delivery of the through shipments (Rec., pp. 227). The following testimony before the Commission was not denied or contradicted by the defendants (Rec., pp. 220-228):

> "With regard to general practices of interchange:
>
> "The general practices among carriers with regard to the interchange of traffic are, in principle:
>
> "(a) Road-haul carrier effects delivery to consignee at destination, assuming cost of terminal expense incident to such delivery;
>
> "(b) Outbound road-haul carrier assumes terminal expense of terminal switching line and intermediate switching line incident to effecting delivery to its line of shipments on which the outbound road-haul carrier secures the road haul;
>
> "(c) Road-haul carrier, inbound, *effects delivery of through shipments to outbound carrier,* either with its own power or through the agency of an intermediate switching line, where such intermediate line is necessary; assumes per diem expense of intermediate line; insures the through movement

of the shipment or assumes responsibility of placing the car and shipment in proper condition for movement by outbound carrier.

"While there are at different junctions certain local agreements which deviate from the general principle outlined herein, it is the general practice to insure the expense of interchange of traffic being effected on a reciprocal basis, each line so interchanging traffic to bear an equitable share of the cost of interchange."

Practice approved by Commission here in effect throughout the United States.

The record further shows without any evidence to the contrary, that all line-haul carriers throughout the United States reciprocally bear and share the cost and expense of interchanging through traffic, whether that interchange is made *direct* or *through the medium of switching lines or service* (Rec., pp. 227). The transcript is replete with hundreds of illustrations in the East, South and West. To support and show the truth and correctness of the foregoing statement, the witnesses described in detail the method and manner of interchanging through traffic at the following major junction points:

Dubuque, Iowa	Bridge Junction, Ark.
East Dubuque, Ill.	Helena, Ark.
Savannah, Ill.	Vicksburg, Miss.
Clinton, Iowa	Natchez, Miss.
Rock Island, Ill.	Vidalia, La.
Burlington, Iowa	Baton Rouge, La.
Ft. Madison, Iowa	Anchorage, La.
Hamilton, Ill.	New Orleans, La.
Quincy, Ill.	Paducah, Ky.
Hannibal, Mo.	Evansville, Ind.
Louisiana, Mo.	Jeffersonville, Ind.
Chaffee, Mo.	New Albany, Ind.
Memphis, Tenn.	Louisville, Ky.

Cincinnati, Ohio
Detroit, Mich.
Toledo, Ohio
Cleveland, Ohio
Columbus, Ohio
Ft. Wayne, Ind.
Springfield, Ill.
East St. Louis, Ill. (not trans-river traffic)
St. Louis, Mo. (not trans-river traffic)
Chicago, Ill.
Kansas City, Mo.
Omaha, Nebr.
South Omaha, Nebr.
Wichita, Kansas
Ft. Worth, Texas
St. Paul-Minneapolis, Minn.
Des Moines, Iowa
Moline, Ill.
Indianapolis, Ind.
Oklahoma City, Okla.
Dallas, Texas
San Antonio, Texas

The Court will observe that the foregoing list of junction points described in the record includes all the Mississippi River crossings from Dubuque, Ia., to New Orleans, La. (Rec., pp. 377-386). At none of these crosings do the carriers maintain a joint facility serving *both* banks of the river except at Natchez, Miss., where a ferry is used to make the interchange. The expense of interchange at Natchez is reciprocally borne by the east and the west side lines (Rec., pp. 381-382). However, wherever traffic is interchanged between trunk lines at these and all other junction points mentioned, the burden and expense of interchange is on a reciprocal basis (Stanage's testimony, Rec., pp. 86-200; pp. 377-386).

The transcript of the testimony before the Commission fully supports the finding of the Commission on this same question in another case (In re Practices of Peoria & Pekin Union Ry. Co., 93 I. C. C. 3, 1. c. 9):

> "In the interchange of traffic between carriers it is the ordinarily accepted practice for the receiving line to designate tracks within a reasonable distance of the intersection of its rails with

those of a connecting carrier where cars will be received from the delivering line, *and the latter places the cars on the tracks so designated.*"

East-side lines admit Terminal is their agent in performing switching service on westbound through traffic.

The record further shows that the east-side lines concede that the Terminal Railroad Association *is their agent* in performing the interchange switching on westbound through traffic. In performing the service, the Terminal does not act as a road-haul carrier. The traffic is interchanged *in switching service* (Ex. No. 58, pp. 3, 13, 21).[5] Although it is a common carrier, it can only operate as a terminal and interchange facility for the east and west-side lines (United States v. St. Louis Terminal, 224 U. S. 383, 236 U. S. 194). The east-side lines recognize that the Terminal is their agent in delivering west-bound through traffic, because for each car handled they reimburse the Terminal for its per diem charges and expenses (Rec., p. 241). Rule Five of the Code of Per Diem Rules of the American Railway Association provides (Rec., p. 241):

[5] Under the decree of the United States District Court the Terminal was permitted to exist and continue "as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and modifying its contracts as herein specified" (Ex. No. 50, p. 2). The proprietary companies were enjoined "from in anywise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered" (Ex. No. 50, p. 2).

> "An amount for each car *in switching service* may be reclaimed by each individual switching road from the road for which the service was performed."

No such reclaims are made when the cars are handled in *road-haul service*. The east-side lines pay these reclaims on westbound traffic. It is the contention of the west-side lines, therefore, that the east-side lines should assume *all* of the expenses incident to a proper and lawful delivery on their rails by absorbing not only the Terminal's per diem charges, but its switching charges as well. The ordinary principles of law governing the relationship of principal and agent should be applied. When an agent performs a service for its principal the latter is liable and must pay. A third person should not be compelled to make a vicarious sacrifice for him.

II

As the Terminal is a Jointly Owned Facility for Interchanging Traffic, Law Requires That Its Upkeep Should be Jointly Borne by East and West Side Lines.

As the Terminal Railroad Association is a joint facility of the east and west side lines owned, or used and enjoyed, by all of them in common, for the interchange of freight in both directions, the law requires that its corporate powers be exercised for the common benefit of *all* of its stockholders (Chicago, M. & St. P. Ry. Co. v. Des Moines U. Ry. Co., 254 U. S. 196, 1. c. 204). Prior to the order herein, the east side lines enjoyed the benefits of their joint facility and participated in *none* of the burdens incident to

the handling of this traffic; for the west side lines paid and bore the *entire* cost of interchanging the traffic. While it is true that the Terminal published a charge for performing this switching service, the owning carriers who happened to be on the west side contributed exclusively to the expenses of operation by absorbing these charges. This absorption of switching charges was and is simply a financial method of *prorating the cost* of the Terminal's maintenance and operation (Richmond C. of C. v. Seaboard A. L. Ry. Co., 44 I. C. C. 455, 1. c. 460); but the court will observe that the east side lines under the method of "prorating the cost" condemned by the Commission, enjoyed the benefit and use of this facility *without the expenditure of a single penny* for the maintenance and upkeep involved in the transfer of this traffic.

If this were initially a court proceeding, it could well be denominated a bill in equity by minority stockholders to compel the majority stockholders to participate in the common burden of maintaining a joint subsidiary owned and used "for the common benefit of all the stockholders"; but as this court has held (Terminal Railroad Association v. United States, 266 U. S. 17) that the procedure for compelling them to so share in the burden of maintenance and upkeep, is within the jurisdiction of the Commission, the west-side lines pursued their only legal means of redress. Having previously taken the position that the controversy involved matters exclusively for the Commission, the east-side lines now take the position that the order herein involved is beyond the power of the Commission. The Commission made the *only order* that *it could have made* in the premises *to compel the appellants to share in the upkeep of the joint property.*

Appellants contend that the order is contrary to the decision in the Peoria & Pekin Union Railway Company case, 115 I. C. C. 469; 93 I. C. C. 3, in that the Commission in that case compelled one set of carriers to "bear the charges of the intermediate switching line in both directions" (Appellant's brief, p. 79, lines 1-3). It is true that the Commission in that case required the *east* side lines to bear the charges of the intermediate switching line in *both* directions, but the switching facility used, the Peoria & Pekin Union Railway, *was owned exclusively by three east side lines* at Peoria. It was *their* switching facility and it was *not* owned *jointly* by the east and west side lines at Peoria. In this case the Terminal Railroad Association is owned jointly by the east and west side lines with supposedly equal rights, privileges, benefits and burdens. The distinction *in facts* reveals the Commission's consistency in judgment. In both cases it applied the principle that a purely arbitrary fiction (Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic Ass'n, 247 U. S. 490, 1. c. 501) should not be allowed to obscure the actual individual facts nor to serve as an instrument for injustice.

The Terminal is a cooperative enterprise (Jonah's Ex. No. 4, p. 19) of the east and the west side lines. Its fixed charges are guaranteed by *all* the owners, and they are pledged to make up any deficit in its operating expenses. As stated by Mr. Maxwell, the leading witness for the eastern lines, the moneys paid to the Terminal are treated *as expenses* and not as revenues (Rec., 288); because practically all of its income is derived from the road-haul carriers by way of switching absorptions. Its upkeep should, therefore, be equitably prorated among the trunk lines.

The operating contracts as amended in 1914 under the provisions of which the Terminal was permitted by this court to continue its existence as a lawful entity (Ex. No. 51, pp. 14, 136) prescribes that every owner thereof in the interchange of freight traffic shall be placed *upon a plane* of equality in respect of benefits and *burdens* (Ex. No. 51, p. 139); that every nonproprietary company shall enjoy and use the rails and facilities thereof upon an equal plane with respect to expenses and charges (Ex. No. 51, p. 140); that the expenses incident to the maintenance and operation of the property *shall be distributed as equitably as possible* (Ex. No. 51, p. 19); that the bridge tolls levied shall at no time be so great as to place any company using said terminal at a disadvantage (Ex. No. 51, p. 23); that the Terminal Railroad Association shall not discriminate in any manner whatever in favor of any company (Ex. No. 51, p. 4), and that each of the owning and using companies shall have equal facilities and accommodations with any other companies (Ex. No. 51, p. 24).

In Chicago, M. & St. P. Ry. Co. v. Des Moines U. Ry. Co., 254 U. S. 196, 1. c. 204, this court considered the relationship of the railroads involved to a terminal company. The terminal company had the title to the properties and entered into operating contracts with the railroad companies. Afterwards the terminal company asserted that it was the absolute owner of the terminal properties, and that the railroad companies were merely stockholders in the usual and customary sense; that the terminal was entitled to its surplus earnings, and that the railroads as stockholders of the terminal company, should not be permitted to deny the absolute ownership of the properties stand-

ing in the name of the terminal company. It was the contention of the railroad companies that the terminal company was merely an instrumentality or trustee of the proprietary companies, and that they were the owners of the equitable title to such properties. This Court said:

> "Upon a review of all the evidence, construing the writings in the light of the circumstances and the manifest purpose and intent of the parties, we are clear that the effect of the transactions thus far recounted was to establish a terminal company, being invested as trustee with complete legal title, but without beneficial ownership, and *subject to a duty to maintain and operate* the property and exercise all its corporate powers *for the common use and benefit* of the three railroad companies, their successors and assigns, and such other companies as might be admitted by them to a proprietary participation in the terminal."

The Commission's order herein prescribing the manner and method of interchanging through freight, is but a fulfillment of the law's requirement that joint owners of a subsidiary corporation maintained for their common benefit shall participate jointly also in the burdens of maintenance.

III

Statute Empowers Commission to Order East-Side Lines to Make Proper and Lawful Delivery and to Participate in Burden and Expense of Interchange Without Considering or Adjudicating Rates and Divisions.

Before the Commission the Appellees, as complainants therein, invoked the powers of the Commission

under paragraphs (3), (4), (6), (10) and (11) of Section 1; paragraphs (1) and (3) of Section 3; and paragraphs (1) and (3) of Section 15 of the Act. These provisions may be enforced without a concurrent issue being raised under paragraph (6) of Section 15 of the Act relating to divisions, or other provisions relating to rates; because the former are distinct, separable and independent of the provisions relating to rates and divisions. The Commission may *compel obedience thereto without examining rates and divisions.* If Appellants' interpretation of the law were approved, it would amount to a judicial amendment to the provisions of the Act relied upon by Appellees. Appellants are seeking to engraft by judicial construction an amendment to paragraphs (3), (4), (6), (10), and (11) of Section 1, paragraphs (1) and (3) of Section 3, and paragraphs (1) and (3) of Section 15 of the Act, which would read about as follows:

> "Provided that the Commission shall be without jurisdiction to enforce the foregoing provisions or to make any orders thereunder, unless and until it simultaneously and concurrently investigates, considers and/or prescribes divisions under paragraph (6) of Section 15 and rates under other provisions of the Act."

Under the Appellants' interpretation of the law, paragraph 3 of Section 3 of the Act would read, for example, with the following amendment shown in italics attached thereto:

> "All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal

facilities for the interchange of traffic between their respective lines; * * * *provided, however, that the Commission must simultaneously and concurrently investigate, consider and/or prescribe the road-haul divisions or rates of the several carriers affected.*"

Appellants make the startling contention that the Commission may not issue any *service orders* relating to proper interchange facilities (paragraph 3 of Section Three), delivery or transfer in transit (paragraphs 3 and 4 of Section One), exchange and interchange of cars (paragraphs 10 and 11 of Section One), terms and conditions under which through routes shall be operated (paragraph 3 of Section Fifteen), matters relating to transporting and delivery of property (paragraph 6 of Section One), and unreasonable and discriminatory practices (paragraph 1 of Section Fifteen), unless and until the rates, and divisions of rates, between all territories on the traffic *moving through the point involved,* are concurrently and simultaneously considered and adjudicated. Stated differently, they contend that when the Commission orders the carriers to cure a *local* practice involving the burden and expense of switching interchange, it must at the same time investigate the rates, and divisions of rates, on all through traffic between stations on the 80,000 miles of railroad operated by the carriers entering the St. Louis-East St. Louis gateway. If their contentions are correct, the Commission must have before it, in order to solve the *purely local* controversy involved here, a rate and division case which must of necessity greatly exceed in magnitude and breadth the New England Divisions Case, 261 U. S. 184, 62 I. C. C. 513, 85 I. C. C. 482. A mere statement of Appellants' con-

tention ought to be sufficient to show its absurdity.

The fundamental errors in Appellants' argument are that

(a) They pretend not to see the distinction between revenues and rates, on the one hand, and the services and expenses, on the other, which a carrier must, under the law, perform or assume as a part of its road-haul obligations in the transportation of freight, as for example making a lawful delivery of through traffic at the end of its line, and

(b) They deliberately ignore the major question involved herein, to wit, the relative duties and rights of road-haul carriers, with respect to the *reciprocal* burdens and expenses of interchanging through traffic in each direction by either direct delivery, or through the medium of a joint switching agency.

Under its road-haul transportation duties, a carrier must perform certain services and incur certain expenses. These are a part and parcel of its obligations under line-haul rates *irrespective of their measure, volume or level.* It must place the car at the point of origin at a proper place for loading (Rec., 227). It must pay per diem charges on foreign cars (Rec., 227). It must frequently absorb switching charges at terminals (Rec., 227). If the freight goes to an industrial track on its line, it must make a proper and lawful delivery to the shipper at its own expense. (Interstate Commerce Commission v. Atchison, T. & S. F. Ry. Co., 234 U. S. 294; Associated Jobbers of Los Angeles v. Atchison, T. & S. F. Ry. Co., 18 I. C. C. 310; National Wholesale Grocery Co. v. Dir. Genl., 62 I. C. C. 375, l. c. 402). It must participate in the burden and expense of interchange switching as that is a transportation service incident to the line-haul (Whitaker-

Glessner Co. v. Baltimore & O. R. Co., 63 I. C. C. 47, l. c. 56). If the freight goes *beyond* its own line, it must make a delivery on the rails of the connecting carrier *at its own expense*. Such is the law of the land. 10 Corpus Juris 534; Myrick v. Michigan C. R. Co., 107 U. S. 102, l. c. 106; Texas & Pacific Ry. Co. v. Reiss, 183 U. S. 621, l. c. 626; Wharton Steel Co. v. Dir. Genl., 59 I. C. C. 11, l. c. 21. Where goods are to be transported to a point *beyond* a terminus of the initial carrier, it is the duty of such carrier to *deliver* the goods *to the connecting carrier*, to be forwarded on its line. 10 Corpus Juris 534, and cases cited. There is a generally recognized obligation on the part of all carriers on through traffic "to make delivery on the rails of their connections, either direct or by bearing charges of the intermediate switching line, and this is the general practice of railroads throughout the country." (Chicago, R. I. & P. Ry. Co., *et al.*, v. Baltimore & O. R. Co., 113 I. C. C. 681, the report in this case.)

It is true that the Appellants will hereafter be compelled to perform more *service*, but that service constitutes only a legal requirement under the *existing* revenues, to wit, a proper and lawful delivery and a participation in the expense of interchange. The Appellants will then be complying with the mandate of the Interstate Commerce law, which requires that all carriers in the transportation of property shall afford reasonable, proper and equal facilities for the interchange of traffic between their respective lines (paragraph 3, Section Three of the Act). *Their rates will not be affected.* They will simply be *fulfilling the law's requirement as to service under those rates.* The Commission orders the Appellants to perform a service *incident to the line-haul*—a delivery of the traffic to

their connections by absorbing the transfer charges of their *own* agents. (Rec. 241)

The Commission has in numerous cases determined what constitutes a proper and lawful delivery as a part and parcel of a carrier's road-haul transportation duties under paragraphs (3) and (4) of Section 1 of the Act without concurrently investigating rates and divisions.

The Commission has in numerous cases promulgated "reasonable rules and regulations with respect to the operation of through routes" under paragraph (4) of Section 1 of the Act without fixing rates and divisions.

The Commission in numerous cases has determined whether any carrier is giving any undue and unreasonable preference to any particular description of traffic or "undue or unreasonable prejudice or disadvantage in any respect whatsoever" under paragraph (1) of Section 3 of the Act without concurrently prescribing rates and divisions.

The Commission has heretofore determined the question of whether carriers are affording "all reasonable, proper and equal facilities for the interchange of traffic" under paragraph (3) of Section 3 of the Act without at the same time prescribing rates and divisions.

The Commission has often determined and prescribed fair and reasonable practices to be thereafter followed by carriers under paragraph (1) of Section 15 of the Act, without simultaneously investigating and determining divisions.

The Commission has often established the terms and conditions under which through routes shall be operated under paragraph (3) of Section 15 of the Act without passing upon rates and divisions.

IV.

Appellants Admitted Before This Court That Fundamental Question Involved Here is the Point of Interchange and That the Commission Has Power to Prescribe it.

When the United States District Court fixed the liability for these transfer charges, and decreed that the east-side lines should bear the expense in one direction (See pertinent copy of decree, Terminal Railroad Association v. United States, 266 U. S. 17, 1. c. 27), the east-side lines took the position before this Court in the case cited that the District Court thereby attempted "to fix the point of interchange as to eastbound traffic in the western limits of St. Louis" (original brief, east-side lines, before this Court, pp. 43-44), and that such a controversy was plainly a question for the Commission. The decree was reversed. The substantive thing which the Commission ordered to be done in the proceeding below, is the absorption and payment of the transfer charges on westbound through traffic. It required the east-side lines to do *exactly* the thing that the District Court required them to do except that the order of the District Court related to the past and the order of the Commission relates to the future. The east-side lines in the former case admitted that the Commission had the exclusive power to fix the point of interchange and that the controversy between these two sets of carriers *involved, after all, only the point of interchange.* They took the position, as we do now, that the transfer charges are but *incidents* of the determination of that fundamental legal issue.

The following extract is from the original brief of the east-side lines before the Supreme Court in Ter-

minal Railroad Association v. United States, 266 U. S. 17 (pp. 43-44):

> "After all, it is at last only the question of what is the point of interchange. Traffic moving east and west through St. Louis is interchanged between east-side lines and west-side lines so there may be a continuous carriage. There must be some point established where there is an interchange of this traffic. Now, up to this time, and for forty years last past, by agreement of parties, this interchange has taken place at the east bank of the river. If this point of interchange is not fair, then it is *within the power* of the Interstate Commerce *Commission to fix another point of interchange.* But what the Court has here attempted to do *is to fix the point of interchange* as to westbound traffic in the western limits of St. Louis and of eastbound traffic at the east bank of the Mississippi River. We can find no authority whatever permitting a Court to do *this,* and we respectfully submit that it is entirely beyond the jurisdiction of a Court to do this until and unless application has been first made to the Interstate Commerce Commission and an order made by that Commission."

Again, in their reply brief before this Court in the same case, they said (p. 23):

> "We have a case, therefore, where there is a point of interchange both at East St. Louis and at St. Louis, and the question involved is: *Where is the reasonable point of interchange? Plainly, this is a question for the Commission.* If we assume that the Terminal Association is dissolved and all its property and facilities become the property of the proprietary lines as tenants in common, the question which the lower court assumed to decide would not be in any way simplified. East St. Louis

> would still be a point on the rails of the west-side lines because their ownership extends to East St. Louis. The east-side lines and the west-side lines would still have to settle the question as to whether the traffic should be interchanged at the one place on the lines of both or at the other place on the lines of both. Such a controversy could be settled only by considering elements with which the Interstate Commerce Commission, as an expert body, is alone qualified to deal."

While it is true that the east-side lines in their brief before the Court in the above case in showing that the Interstate Commerce Act has "given from time to time broad and still broader powers over the railroad systems," cited paragraph (6) of Section Fifteen of the Act relating to divisions, they also cited in part the provisions of the Act relied upon by Appellees herein, to-wit, paragraph (4) of Section One relating to providing reasonable facilities for operating through routes, paragraphs (10) and (11) of Section One, defining car service, and paragraph (3) of Section Three, of the Act, requiring carriers to provide all reasonable, proper and equal facilities for the interchange of traffic (Appellants' brief, pp. 27, 28; see also Chapter VI, *infra*).

V.

Even Under Appellants' Theory Commission Had Jurisdiction to Promulgate the Order Because Their Sole Affirmative Defense and Their Evidence Related Exclusively to Rates and Divisions.

The Appellees did not in their complaint before the Commission tender or raise an issue as to road-haul rates and divisions for the simple reason that *they*

were not asking for increased rates or divisions. Certainly no one could expect the complainants to file a complaint asking that the divisions of the east side lines be increased and that their own be reduced. The west side lines were contending that their eastern road-haul connections should perform the service of interchange in one direction under their *existing* rates and divisions, for the western lines had from the beginning performed this double interchange service *without any additional compensation therefor* (Chapter I, *supra;* Maxwell's testimony, Rec., p. 274), and, when the east side lines recognized St. Louis as a station on their lines by increasing their St. Louis-East St. Louis rates from 116 to 117 per cent (Rec., p. 342; Appellants' brief, p. 18), they *did then,* have *ever since* and *do now* apply those *increased* rates to the relatively greater amount of through *traffic covered by the order herein* (Witness Adams, Rec., p. 367; witness Nash, Rec., p. 342), and also since 1906 their rates to St. Louis-East St. Louis *have been increased on* the average of *about 100 per cent.* (Nash's Ex. No. 72, Rec., p. 616; Appendix A, *infra*). Mr. F. A. Adams, Assistant Freight Traffic Manager of the Rock Island Lines, testified, without contradiction, that the east side lines when they entered St. Louis and raised their rates from 116 to 117 per cent, *applied those increases on all through traffic* covered by the order herein. He said (Rec., p. 367):

> "At that time, and to a great extent now the territory affected was Missouri, Missouri river, Kansas, Nebraska, Colorado, Utah, Oklahoma, to which, of course the volume of the traffic is many, many times greater than to St. Louis. Although, as I have previously stated, it was a local adjust-

ment to St. Louis and East St. Louis, the eastern lines *got the benefit of that advance to all that vast territory,* and additionally, and as explained by Mr. Leland, in his testimony yesterday, prior to the 15 per cent advance case, through rates to Texas, Oklahoma, Arkansas and Louisiana were divided by allowing the lines east of East St. Louis *their full local rates,* so they also *received that increase* as a division of through rates, to points in the Southwest, and as also explained by Mr. Leland, I want to point out *that increase is reflected today in the divisions* of the eastern lines, regardless of the fact that such divisions are slightly less than the local rates."

On the other hand, if the Appellants believed that the west side lines were now being compensated for the interchange service under their rates and divisions or that their (the east side lines) rates and divisions were too low to enable them to perform the interchange service, it was essentially a matter of defense for them to plead it in their answer. In other words, if the Appellants believed that the divisions or rates should be changed by reason of a different practice as to interchange and delivery, that was essentially a matter of defense. By their pleadings before the Commission the *defendants recognized that the question of divisions was a matter of defense* to the complaint; for in their answer they formally tendered the issue of rates and divisions (Appellants' brief, p. 5). They are, therefore, foreclosed and estopped from claiming that such an issue should have been submitted by the Appellees; because, as issues are made up by considering the *answer* as well as the complaint, the Appellants *have had their day in court* on the question of rates and divisions insofar as they

affect these transfer charges. If their *evidence* failed to establish the *allegations* of the *answer*—and it did fail—the Appellees should not suffer.

If this Court should so construe the law as to prohibit the Commission from prescribing orders under the provisions of the Act invoked by Appellees before the Commission (paragraphs (3), (4), (6), (10) and (11) of Section 1; paragraphs (1) and (3) of Sectoin 3; and paragraphs (1) and (3) of Section 15 of the Act) without having before it concurrently a proper raised issue as to rates and divisions between all points on the lines of the carriers operating east and west from the point of interchange, *the east side lines supplied the omission.*

In their respective answers filed before the Commission the east side lines said:

> "Further answering, these defendants aver that the sole question in this case is as to the lawful measure of the amounts received by the east side lines and the west side lines, respectively, for their services in connection with through traffic moving through the St. Louis-East St. Louis gateway or West Alton, and that wherever the west-side lines bear the cost of the transfer charges across the river, said west side lines are fully compensated by the amounts received by them for their services in connection with such through traffic, and that if the amounts received by either the east side or west side lines are in any way unfair, unjust or inequitable, such unfairness, injustice and incquality arises because the west side lines receive greater amounts than they are fairly entitled to."

The foregoing is a plea in the nature of a confession and avoidance. It was their sole affirmative de-

fense in the case. The burden of proof was, therefore, upon the defendants (22 *Corpus Juris* 68). The evidence introduced by the *defendants* related exclusively to rates and divisions (Witness Sudborough, Rec., p. 253; Maxwell, Rec., p. 265; Furry, Rec., p. 297; Drescher, Rec., p. 316; and Decamp, Rec., p. 319). All of them were traffic officials of eastern lines and the record shows their evidence deals solely with rates and divisions. The complainants, without any objection from the defendants, on rebuttal, *squarely met the issue thus raised* in the answer. An abundancy of testimony was introduced with relation thereto (Rec., pp. 323-328; pp. 340-366; pp. 366-376; pp.. 387-388). Briefly summarized, the oral testimony and documentary evidence introduced by the complainants on rebuttal conclusively shows that although the west side lines bore the burden and expense of transfer in both directions they were neither "fully compensated" nor even partially compensated "by the amounts received by them for their services in connection with such through traffic."(See answer, *supra;* Witnesses Leland Rec., p. 328; Nash, Rec., p. 340; Adams, Rec., p. 366; and Haile, Rec., p. 323). Furthermore, the allegations of the answer that the west side lines were compensated out of their rates and divisions for the river transfer service was thoroughly exploded even from the lips of the leading witness for the defendants (Chapter I, *supra;* Maxwell's testimony, Rec., p. 274).

In its report herein the Commission said:

> "The history of both the combination rates and the divisions of the joint rates applicable to this traffic indicates that the transfer charge of the Association was given little or no consideration

> in the establishment of any of these rates or divisions. The fact is that, finding the opportunity there, *defendants took advantage of it* to require *complainants* to continue *to pay* the transfer charge, not only on *eastbound* traffic, but also on *westbound* traffic."

A joint committee of the east and west side lines, appointed at a meeting held on October 30, 1915, reported as follows:

> "Prior to the completion, in 1877, of the Chicago & Alton's bridge at Louisiana, Missouri, rates between points east and west of St. Louis-East St. Louis were made on the full combination of locals with the Mississippi River transfer charge added, the rates of the west-side lines applying to or from St. Louis and of the east-side lines from or to East St. Louis. With the completion of the Chicago & Alton bridge that line published the *St. Louis basis* of rates between *East St. Louis* and stations on its lines west of the Mississippi River, forcing the west side lines to take similar action and *absorb* the river transfer, as the through rates were necessarily based on East St. Louis, there being no rates published between St. Louis, Missouri, and points east of the Mississippi River." (Ex. No. 59, pp. 5, 6.)

The oral and documentary evidence in the record demonstrate beyond any question that the west side lines were and are not compensated by the rates and divisions for performing the interchange service between the east and the west bank of the river. It is true that this issue was not presented in the complaint for the reasons that, as heretofore stated, the western lines insisted that the eastern lines should perform the interchange service in one direction un-

der their *present* rates and divisions; but as the issue was raised by the defendants, the order herein is clearly valid even if the court holds that rates and divisions must be considered in connection with service orders pursuant to the statutory provisions relied upon by Appellees.

VI.

This Court Did Not in Former Decision Decide That Remedy of Appellees was Under Provisions of Statute Relating to Rates and Divisions.

Appellants contend that this Court in Terminal Railroad Association v. United States, 266 U. S. 17, decided that the remedy, if any, of the Appellees herein as complainants before the Interstate Commerce Commission is confined to those provisions of the Act relating to rates, in so far as traffic moving under the combination of locals is concerned, and to paragraph (6) of Section Fifteen of the Act, relating to divisions, in so far as traffic moving under joint through rates is concerned.

Ignoring for the present the fact that the Commission could not in a case involving the *measure* or *level* of rates and divisions, issue *service* orders, fix the point of interchange, compel defendants to perform a lawful delivery or participate in the burden of interchange, the question discussed in this chapter must be decided by an "examination of the issues made and intended to be submitted and what the decree was really designed to accomplish." (Vicksburg v. Henson, 231 U. S. 259, l. c. 269, 273).

It is elementary that "what was involved and determined in the former suit is to be tested by an ex-

amination of the record and proceedings therein including the *pleadings*, evidence submitted, the respective *contentions* of the parties, and the findings and opinion of the Court." (State of Oklahoma v. State of Texas, 256 U. S. 70, l. c. 85.)

An examination of (a) the record, or (b) the pleadings, and (c) of the respective contentions of the parties in that case as disclosed by the record before this Court clearly demonstrates that this Court did not pretend to decide just what sections of the Act the present practices at St. Louis-East St. Louis violated, nor under just what sections of the Act the west side lines should attempt to correct the practices. That issue was not decided. The controversy "distinctly put in issue and directly determined" by this Court in that case was whether the east side lines and the Terminal Railroad Association had violated the decree of the District Court (Ex. No. 50, inter alia) by failing to bear the transfer charges on westbound traffic. The Court held that the decree had not been violated and further held that the controversy was one for determination by the Interstate Commerce Commission in the first instance.

Appellants in that case did not contend that the sole remedy of the Appellees was under the provisions of the Act relating to rates and under paragraph (6) of Section fifteen of the Act relating to divisions. In urging that the controversy was a matter within the cognizance of the Interstate Commerce Commission, they cited in their briefs several sections of the Interstate Commerce Commission, including some of those relied upon by the Appellees herein. In addition to paragraph (6) of Section fifteen of the Act, they cited paragraphs (4), (10), and (11) of Section one and paragraph (3) of Section (3) and paragraph

(3) of Section fifteen of the Act (Appellants' brief therein, pages 28-29). The Court upheld their view and cited, among other provisions of the Act, paragraph (1) of Section fifteen, prohibiting *unlawful practices.* The question whether the controversy was one solely and exclusively under paragraph (6) of Section fifteen and other paragraphs relating to rates, was not therefore "distinctly put in issue" nor "directly tendered" in that case. This court left the Commission free to determine what *specific provisions* of the Act the present interchange arrangements violated, and it was at liberty to exercise its judgment upon all the facts before it, and the law applicable thereto, without being "cribbed. crabbined or confined" to the sections relating to rates and divisions.

Furthermore, an examination of the *pleadings* filed by the defendants in that case *disposes of the contention made here;* for they did not put in issue the question whether the remedy of the complainants was exclusively under paragraph (6) of Section fifteen of the Act, but whether the Commission had jurisdiction of the controversy under *any and all* of its powers under the Interstate Commerce Act. We quote in part from the answer of the east side lines filed before the Supreme Court (printed record therein, pp. 206, 207):

> "Respondents submit to the court that the *following questions arise* on the prayer of the petitioners:
>
> (1) Is the method by which the Terminal Association raises its necessary revenue an unlawful one?
>
> (2) Is the inclusion in the tariffs of the proprietary and non-proprietary lines of the Terminal Association unlawful, and are the divisions sheets attendant on such tariffs in providing a charge for said Terminal Association, unlawful?

(3) Is the concurrence of the Terminal Association in these tariffs unlawful?

(4) Should there be required the elimination of the Terminal Association from these tariffs, and the cancellation of these concurrences?

(5) Must the Terminal Association, for the raising of its revenues, confine itself to the promulgation of a switching tariff—that is, a uniform charge for the movement of cars over its lines, without regard to the contents of such cars or the service performed.

(6) *Shall East St. Louis continue* to be the *point* at which traffic shall be *interchanged* between the East Side lines and the West Side lines, or shall some *other interchange point be established* for part or all of said traffic?

(7) *If* a change is made in said interchange point, what, *if any,* changes shall be made in the tariffs or division sheets of the East and West Side Lines?

(8) Must the Terminal Association allow each of the proprietary and non-proprietary lines to haul its traffic over the rails of said Association and its subsidiaries, with its own engines and employees?

Respondents submit that all *these questions* are matters over which either the Interstate Commerce Commission or the managing officers of the Terminal Association, with the concurrence of said Interstate Commerce Commission, have control, and which were expressly, by the final decree, left in their control."

It will be observed from the foregoing answer of the east side lines in the former case before this Court, that one of the questions arising was whether East St. Louis should continue to be the point at which traffic should be interchanged between the east and the west side lines, or some other interchange point be estab-

lished for part or all of the traffic and also that if a change should be made in such interchange point, what, *if any*, change should be made in the tariffs or division sheets of the east and the west side lines. The foregoing plainly demonstrates that the east side lines recognized that the fundamental issue between these carriers was as to the point of interchange and that the question of rates and divisions *might* be affected thereby. The east side lines submitted to the Court that "*all* of *these questions* are matters over which the Interstate Commerce Commission * * * has control." Plainly, therefore, the issue as to whether the *sole* remedy of the west side lines was under the provisions of the Act relating to rates and divisions, and not under the provisions of the Act relating to interchange and delivery, was *not* an issue and was *not intended* by the east side lines to be submitted. The pleadings, therefore, before the Court in that case conclusively disprove the contention now made by the Appellants.

Furthermore, the east side lines in other briefs before this Court in contending that the controversy was within the jurisdiction of the Commission did not contend that it was exclusively a controversy under paragraph (6) of Section Fifteen of the Act, but cited in addition thereto the following sections of the Interstate Commerce Act showing the "powers of the Interstate Commerce Commission in reference to the matters here in controversy" (Appellants' brief, pages 27-28):

Paragraph (4,) of Section One:

> "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish

such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers."

Paragraph (10) of Section 1:

"The Term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act."

Paragraph (11) of Section 1:

"It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Paragraph (3) of Section 3:

"All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective

powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their fares, and charges between such connecting lines, or duly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

VII.

Order of Commission is Valid and is a Lawful Exercise of Power Even Though the Interchange Arrangements Condemned Did Not Constitute a "Practice" Within the Meaning of That Term as Used in the Act.

Appellants state that (a) the west side lines invoked the jurisdiction of the Commission by presenting the question "solely as one involving a practice" (Appellants' brief, p. 2, line 31), and (b) that the interchange arrangements condemned do not constitute a "practice" within the meaning of that word as used in the Act. Appellants are in error both as to their alleged statement of fact and their conclusions of law.

The Appellees did *not submit this case to the Commission "solely as one involving a practice";* for they relied not only upon paragraph (1) of Section Fifteen of the Act which relates to "practices," but also upon paragraph (3) of Section Three, paragraphs (3), (4), (10) and (11) of Section One, and paragraph (3) of Section Fifteen, of the Act, which do not relate to practices.

The position taken by Appellants before the Commission (See 113 I. C. C. 681, l. c. 683, 2nd par.) that

the word "practice" as used in the Act relates only to matters between shippers and carriers, and not to questions affecting the handling of traffic *between carriers,* is directly contrary to the decisions of this Court in the Chicago Junction case, 264 U. S. 258, l. c. 267, and Tap Line cases, 234 U. S. 1, l. c. 29; for in the latter case, this Court said that the Commission "has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular *carriers* or shippers," and in the former case it said: "It is injury inflicted by denying to plaintiffs equality of treatment. To such treatment *carriers* are, under the Interstate Commerce Act, as fully entitled as any shipper." Moreover, Appellants have evidently overlooked the provisions of Section Thirteen of the Act which provides that any person, firm, corporation, company * * * or *common carrier,* complaining of anything done or omitted to be done, by any common carrier subject to the provisions of the Act in contravention of the provisions, may apply to the Commission by petition, etc.

As a matter of fact and law it is entirely immaterial whether the arrangements condemned by the Commission, constitute a "practice" as that term is used in the Act; because the ultimate legal question before this Court is whether the Commission has the power and authority under *any of the provisions* of the Interstate Commerce Act to make the order. The foregoing provisions of the Act relied upon by Appellees and *not* relating to practices, fully sustain the power and authority of the Commission to promulgate the order herein for the reasons hereinafter stated.

The east side lines plainly violated paragraph (3) of Section Three of the Act which requires them to afford

reasonable, proper and equal facilities for the interchange of traffic and for the receiving, forwarding and delivering of property to and from their several lines or those that connect therewith. They refused to afford such reasonable and equal facilities in that they compelled the west side lines under the arrangement condemned, to furnish *all* of the facilities of interchange in both directions. The rails of the Terminal *are the "facilities" used for interchange.* It collects a switching charge for each car so interchanged; but this is simply a financial arrangement of pro-rating the cost of the Terminal's maintenance and operation (Richmond Chamber of Commerce v. Seaboard A. L. Ry. Co., 44 I. C. C. 455, l. c. 460). The equality of interchange was not maintained under the former arrangements because the east side lines did not participate to any extent in the absorption or payment of these charges. They did not, therefore, furnish equal and reasonable facilities for the interchange of traffic on which they received line-haul rates and charges.

Furthermore, the arrangement in effect prior to the order herein governing the interchange of through trans-river traffic constituted a plain violation of the provisions of paragraph (4) of Section One of the Act in that the east side lines refused to provide reasonable facilities for operating through routes to St. Louis, the end of their respective lines, and to "make reasonable rules and regulations with respect to the operation of such through routes." This paragraph does not deal with "practices." By virtue of their ownership, control and perpetual right to the joint use of the rails of the Terminal, the east side carriers now fully recognize that their respective lines end at St. Louis and they should, therefore, as a matter of law, operate through

routes ~~rates~~ to that point on west bound traffic; for the compensation on the traffic involved herein is exactly the same as it is on a local shipment to St. Louis.

Moreover, under paragraphs (3) and (4) of Section 1 of the Act it is the duty of carriers to furnish and provide transportation, and the term "transportation" includes all services in connection with the receipt, *delivery* and transfer in transit of property transported. These two paragraphs do not relate to "practices." The Commission ordered the east side lines to deliver the traffic on the rails of the west side lines. This is nothing more or less than the *fulfillment of their duties as initial carriers under the common law.* In Myrick v. Michigan C. R. Co., 107 U. S. 102, l. c. 106, this Court said:

> "If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own lines, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to *deliver* safely the goods *to such line*—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line."

The foregoing quotation was also cited with approval by this Court in Texas & Pacific v. Reiss, 183 U. S. 621, l. c. 626, and in 10 Corpus Juris 534 the rule is stated as follows:

> "Where goods are to be transported to a point *beyond* the terminus of the initial carrier it is the duty of such carrier to *deliver* the goods *to the connecting carrier,* to be forwarded on its line, within a reasonable time, and in good condition for transportation."

Appellants allege in their bill of complaint (p. 9, Rec., pp. 7, 8) that the fact that the west side lines since 1877 have published their St. Louis, Missouri, rates to and from East St. Louis, and, thereby, absorbed the transfer charges in both directions, does not constitute a "practice" within the meaning of the Act, and that if it were a practice, it would be a practice of the west and not of the east side lines.

Appellants confuse effects with causes; fundamental duties of carriers under the law with the collateral burdens that flow therefrom; reasonable practices with the effect thereof. This is not a controversy over road haul rates; for the *rates* of the east side lines on west bound traffic are exactly the same to both St. Louis and East St. Louis. This is a controversy over the point of interchange. The west side lines were seeking to have the "practice" of interchange modified or changed. It was not a unilateral practice, for the east sides lines prior to the order compelled the west side lines to interchange traffic in both directions on their rails. The west side lines could not change the practice without the intervention of the mighty hand of the Commission. *The traffic involved herein is now being interchanged at St. Louis.* Certainly such an arrangement constitutes a "practice" and the east side lines have so admitted to this Court; for in their briefs, elsewhere cited herein, before this Court in Terminal Railroad Association v. United States, 266 U. S. 17, they said (their original brief, pp. 43-44):

> "After all, it is at last only the question of what is the point of interchange. * * * Up to the time that the Commission has been appealed to to make an order, and has refused to change an *existing practice.* * * * then the point of interchange fixed by the parties must stand."

The east side lines have themselves, therefore, stamped this controversy as a "practice."

In so far as this phase of the controversy is concerned, the question before this Court is whether the substantive provisions of the Interstate Commerce Act empower the Commission to order the east side carriers to participate in the burden and expense of interchange by delivering westbound traffic on the west bank of the river. If it has the power under the provisions of the law heretofore cited, then it is immaterial whether it is a "practice," or an "arrangement," or a "usage," or any other synonymous terms that may be found in a dictionary. That the Commission has the power this Court has already decided. *That question is res adjudicata.* It cannot be controverted again. If, however, it be relevant to determine whether the substantive thing which the Commission has ordered the east side lines to do, constitutes a "practice," the following decisions clearly show that the manner and method and means of interchanging through freight between carriers constitutes a practice within the meaning of that term as used in the Act:

> Northern Pacific v. Solum, 247 U. S. 477, l. c. 483.
> Central R. Co. of N. J., *et al.*, v. United States, *et al.*, 257 U. S. 247, l. c. 257.
> Louisville & Nashville R. Co. v. United States, 238 U. S. 1, l. c. 17.
> Atchison, T. & S. F. Ry. Co. v. United States, 232 U. S. 199, l. c. 221.
> Postal Telegraph-Cable Co. v. Western Union Telegraph Co., 59 I. C. C. 512, l. c. 516.

In Louisville & Nashville R. Co. v. United States, *supra,* this Court said, l. c. 20:

> "The question, as to power of the Commission to make this part of the order, is settled by the decision in Pennsylvania Company v. United

States, 236 U. S. 318, recently decided. The appellants, however, insist that that case did not involve switching, but transportation; and further they claim that the Pennsylvania road was there ordered to discontinue discrimination—while here the appellants are required by an affirmative order to devote their property to the use of a parallel and competing carrier. But the alleged differences do not serve to take the present case out of the principle announced in that just cited. For in this order the prohibition against the *existing practice* and the requirement to furnish *equal facilities* came to the same *thing.*"

VIII.

CONCLUSION.

Appellees respectfully submit that the order made by the Commission should be declared to be valid for the following reasons:

First. The law imposes a duty upon initial carriers to deliver *through* traffic *on the rails* of the connecting carriers. (10 Corpus Juris 534; Myrick v. Michigan C. R. Co., 107 U. S. 102, l. c. 106.)

Second. That by reason of the entrance of the east side lines to St. Louis through their joint subsidiary, the Terminal, (Manufacturers Ry. Co. v. St. Louis, I. M. & S. Ry. Co., 28 I. C. C. 93, l. c. 105), their obligation to deliver local traffic at St. Louis (St. Louis Terminal case, 34 I. C. C. 453, l. c. 456), their recognition of the two cities as one community (Business Men's League of St. Louis v. Atchison, T. & S. F. Ry. Co., 44 I. C. C. 308, l. c. 311), their establishment of the same basis of rates to both cities (Class and Commodity Rates, 32 I. C. C. 471, l. c. 475), their failure to accord the *same service* for traffic destined *beyond* St. Louis that they

perform on traffic destined *locally* to St. Louis constitutes a violation of the Act prohibiting undue prejudice against particular persons and discrimination of traffic.

Third. That as the Terminal Railroad Association is a jointly owned facility for interchanging traffic in the St. Louis-East St. Louis district between the east and the west side lines and theoretically exercises its corporate powers for the common benefit of all of its stockholders, the law requires that its upkeep and maintenance should be jointly borne by the east and the west side lines (Chicago, M. & St. P. Ry. Co. v. Des Moines U. R. Co., 254 U. S. 196, l. c. 204.)

Fourth. That the statutory provisions invoked by Appellees and Commission's order thereunder may lawfully be enforced without considering or adjudicating the level or measure of rates and divisions; because the foregoing provisions are separable, distinct and independent of the other provisions of the Interstate Commerce Act relating to rates and divisions, as, for example, paragraph (6) of Section Fifteen.

Fifth. That as the issues of rates and divisions was raised and tendered by the Appellants as an affirmative defense before the Commission, the east side lines are now foreclosed and estopped from claiming that such an issue should initially have been raised and tendered by the Appellees in their complaint before the Commission.

Sixth. That the question of the power of the Commission to make a lawful order herein is *res adjudicata* and cannot now be re-examined. The Commission ordered the east side lines to do the *identical thing* that the United States District Court ordered them to do (Compare decree as copied in Terminal Railroad Association v. United States, 266 U. S. 17, l. c. 27, and order of Commission herein, Rec., pp. 27, 28). As this Court

held that the decree of the District Court was without authority of law and that the Interstate Commerce Commission could lawfully make such an order, the question of the power of the Commission is now foreclosed.

The east side lines made no attempt before the Commission to show that the former practices of compelling the west side lines to bear the expense of transfer in *both* directions was just, fair, reasonable or proper. A perusal of their brief before this Court will show that their defenses therein related solely to the technics of procedure. They contended that the west side lines should have brought a cause seeking increased rates and divisions, notwithstanding the fact that the Commission in such a proceeding, could not compel them to participate reciprocally in the *burden of interchange or order* lawful and proper *delivery*. Had the west side lines brought a case asking for increased rates and divisions, the eastern carriers would, no doubt, have contended as they did before this Court in the former case, that the controversy involved after all *only* the question as to a *reasonable point of interchange* (see Chapter IV, *supra*).

Conditions in the St. Louis-East St. Louis switching district have radically and materially changed since 1877 when the west-side lines first assumed the burden of interchange in both directions and the *initial cause thereof has entirely lost its force;* for the railroads themselves in 1877 controlled the routing of traffic, and the east side lines had no rails and maintained no through routes to St. Louis. The eastern lines have, nevertheless, stressed the fact that since the western carriers assumed this burden since 1877, they should perpetually bear the expense of interchange. Since that time, however, the Interstate Commerce Act has

been enacted and its substantive provisions require carriers to furnish reasonable, equal and ample facilities for the interchange of traffic. Since that time the Terminal Railroad Association has been organized with joint facilities on both sides of the river for the interchange of traffic, but the east side lines have shared in all the benefits therefrom and have participated in none of the burdens in so far as this traffic is concerned. Through their numerical majority on its board of directors, the east side lines were able, up to the effective date of the Commission's order herein, to perpetuate this unjust burden on the western carriers long after the initial cause therefor had entirely spent its force. The doctrine of the east-side lines is: "Whatever is, is right." They deny the right of a carrier to assert its prerogatives under the law to remove a burden assumed under the exigencies of competition when the conditions were materially and radically different at St. Louis-East St. Louis than they are today. Two traffic executive officers of the eastern lines frankly recognized the unfairness and the injustice of the former practices and the Interstate Commerce Commission has refused to sanction the antiquated code that might makes right.

Respectfully submitted,

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March 5, 1928.

APPEND

REPRESENTATIVE CLASS RATES
LOUIS, MO., AND EAST ST. LO
(Nash Exhibit No. 72.)

CLASS RATES FROM EASTERN POI
ST. LOUIS, MO., AS O

TO EAST ST. LOU

Station From	Date	Classes. 1	2	3	4
Cincinnati, Ohio.	Feb. 1, 1906.....	40	34	25	17
	Feb. 1, 1908.....	41	34.5	25.5	17.5
	July 1, 1922.....	85	72.5	57	42.5
	Incr. 1922 over 1906..	45	38.5	32	25.5
	Per cent. of Increase..	112.5%	113.2%	128.0%	150.0
Cleveland, Ohio.	Feb. 1, 1906.....	51.5	44.5	33	23
	July 1, 1908.....	52.5	45.5	33.5	23
	July 1, 1922.....	103.5	88	69.5	52
	Incr. 1922 over 1906..	52.0	43.5	36.5	29
	Per cent. of Increase..	101.0%	98.8%	110.6%	126.1
Columbus, Ohio.	Feb. 1, 1906.....	45	39	30	21
	Feb. 15, 1908.....	46	39.5	30.5	21.5
	July 1, 1922.....	94.5	80.5	63.5	47.5
	Incr. 1922 over 1906..	49.5	41.5	33.5	26.5
	Per cent. of Increase..	110.0%	106.4%	111.7%	126.2
Detroit, Mich.	Feb. 1, 1906.....	45	39	30	21
	Aug. 18, 1908.....	46	39.5	30.5	21
	July 1, 1922.....	100.5	85.5	67.5	50.5
	Incr. 1922 over 1906..	55.5	46.5	37.5	29.5
	Per cent. of Increase..	123.3%	119.2%	125.0%	140.5
Indianapolis, Ind.	Feb. 1, 1906.....	37	32	23.5	16
	Feb. 10, 1908.....	38	32.5	24	16.5
	July 1, 1922.....	77.5	66	52	39
	Incr. 1922 over 1906..	40.5	34	28.5	23
	Per cent. of Increase..	109.5%	106.3%	121.3%	143.8
Louisville, Ky.	Feb. 1, 1906.....	40	34	25	17
	Feb. 1, 1908.....	41	34.5	25.5	17.5
	July 1, 1922.....	79	67	53	39.5
	Incr. 1922 over 1906..	39	33	28	22.5
	Per cent. of Increase..	97.5%	97.1%	112.0%	132.4
New York, N. Y.	Feb. 1, 1906.....	87	75	58	41
	Jan. 2, 1908.....	88	76	59	41
	July 1, 1922.....	166	145.5	110.5	77
	Incr. 1922 over 1906..	79	70.5	52.5	36
	Per cent. of Increase..	90.8%	94.0%	90.5%	87.8
Pittsburgh, Pa.	Feb. 1, 1906.....	55.5	48.5	37	26
	June 20, 1908.....	56.5	49	37.5	26
	July 1, 1922.....	122.5	104	82	61
	Incr. 1922 over 1906..	67	55.5	45	35
	Per cent. of Increase..	120.7%	114.4%	121.6%	134.6

Source of Information: Exhibit 72, in I. C. C. Docket 16697.

APPENDIX "A"

REPRESENTATIVE CLASS RATES FROM EASTERN POINTS TO ST. LOUIS, MO., AND EAST ST. LOUIS, ILL., AS OF VARIOUS DATES. (Nash Exhibit No. 72.)

CLASS RATES FROM EASTERN POINTS TO EAST ST. LOUIS, ILL., AND ST. LOUIS, MO., AS OF VARIOUS DATES.

Rates in Cents Per 100 Pounds.

Station From	Date	TO EAST ST. LOUIS, ILL. CLASSES.						TO ST. LOUIS, MO. CLASSES.					
		1	2	3	4	5	6	1	2	3	4	5	6
Cincinnati, Ohio.	Feb. 1, 1906.....	40	34	25	17	15	12	42	36	26	18	15.5	12.5
	Feb. 1, 1908.....	41	34.5	25.5	17.5	15	12	41	34.5	25.5	17.5	15	12
	July 1, 1922.....	85	72.5	57	42.5	30	24	85	72.5	57	42.5	30	24
	Incr. 1922 over 1906..	45	38.5	32	25.5	15	12	43	36.5	31	24.5	14.5	11.5
	Per cent. of Increase..	112.5%	113.2%	128.0%	150.0%	100.0%	100.0%	102.4%	101.4%	119.2%	136.1%	93.5%	92.0%
Cleveland, Ohio.	Feb. 1, 1906.....	51.5	44.5	33	23	19.5	15.5	53.5	46.5	34	24	20	16
	July 1, 1908.....	52.5	45.5	33.5	23	19.5	15.5	52.5	45.5	33.5	23	19.5	15.5
	July 1, 1922.....	103.5	88	69.5	52	36	29	103.5	88	69.5	52	36	29
	Incr. 1922 over 1906..	52.0	43.5	36.5	29	16.5	13.5	50.0	41.5	35.5	28	16	13
	Per cent. of Increase..	101.0%	98.8%	110.6%	126.1%	84.6%	87.1%	93.5%	89.3%	104.4%	116.7%	80.0%	81.3%
Columbus, Ohio.	Feb. 1, 1906.....	45	39	30	21	18	14	47	41	31	22	18.5	14.5
	Feb. 15, 1908.....	46	39.5	30.5	21.5	18	14	46	39.5	30.5	21.5	18	14
	July 1, 1922.....	94.5	80.5	63.5	47.5	33	26.5	94.5	80.5	63.5	47.5	33	26.5
	Incr. 1922 over 1906..	49.5	41.5	33.5	26.5	15	12.5	47.5	39.5	32.5	25.5	14.5	12.0
	Per cent. of Increase..	110.0%	106.4%	111.7%	126.2%	83.3%	89.3%	101.1%	96.3%	104.8%	115.9%	78.4%	82.8%
Detroit, Mich.	Feb. 1, 1906.....	45	39	30	21	18	14	47	41	31	22	19	15
	Aug. 18, 1908.....	46	39.5	30.5	21	18	14	46	39.5	30.5	21	18	14
	July 1, 1922.....	100.5	85.5	67.5	50.5	35	28	100.5	85.5	67.5	50.5	35	28
	Incr. 1922 over 1906..	55.5	46.5	37.5	29.5	17	14	53.5	44.5	36.5	28.5	16	13
	Per cent. of Increase..	123.3%	119.2%	125.0%	140.5%	94.4%	100.0%	113.8%	108.5%	117.7%	129.5%	84.2%	86.7%
Indianapolis, Ind.	Feb. 1, 1906.....	37	32	23.5	16	13.5	10.5	39	34	24.5	17	14	11
	Feb. 10, 1908.....	38	32.5	24	16.5	13.5	10.5	38	32.5	24	16.5	13.5	10.5
	July 1, 1922.....	77.5	66	52	39	27	21.5	77.5	66	52	39	27	21.5
	Incr. 1922 over 1906..	40.5	34	28.5	23	13.5	11.0	38.5	32	27.5	22	13	10.5
	Per cent. of Increase..	109.5%	106.3%	121.3%	143.8%	100.0%	104.7%	98.7%	94.1%	112.2%	129.4%	92.9%	95.5%
Louisville, Ky.	Feb. 1, 1906.....	40	34	25	17	15	12	42	36	26	18	15.5	12.5
	Feb. 1, 1908.....	41	34.5	25.5	17.5	15	12	41	34.5	25.5	17.5	15	12
	July 1, 1922.....	79	67	53	39.5	27.5	22	79	67	53	39.5	27.5	22
	Incr. 1922 over 1906..	39	33	28	22.5	12.5	10	37	31	27	21.5	12.0	9.5
	Per cent. of Increase..	97.5%	97.1%	112.0%	132.4%	83.3%	83.3%	88.1%	86.1%	103.8%	119.4%	77.4%	76.0%
New York, N. Y.	Feb. 1, 1906.....	87	75	58	41	35	29	89	77	59	42	35.5	29.5
	Jan. 2, 1908.....	88	76	59	41	35	29	88	76	59	41	35	29
	July 1, 1922.....	166	145.5	110.5	77	66	55.5	166	145.5	110.5	77	66	55.5
	Incr. 1922 over 1906..	79	70.5	52.5	36	31	26.5	77	68.5	51.5	35	30.5	26.0
	Per cent. of Increase..	90.8%	94.0%	90.5%	87.8%	88.6%	91.3%	86.5%	89.0%	87.3%	83.3%	85.9%	88.1%
Pittsburgh, Pa.	Feb. 1, 1906.....	55.5	48.5	37	26	22.5	18.5	57.5	50.5	38	27	23	19
	June 20, 1908.....	56.5	49	37.5	26	22.5	18.5	56.5	49	37.5	26	22.5	18.5
	July 1, 1922.....	122.5	104	82	61	43	34	122.5	104	82	61	43	34
	Incr. 1922 over 1906..	67	55.5	45	35	20.5	15.5	65.0	53.5	44	34	20	15
	Per cent. of Increase..	120.7%	114.4%	121.6%	134.6%	91.1%	83.8%	113.0%	105.9%	115.8%	125.9%	87.0%	78.9%

Source of Information: Exhibit 72, in I. C. C. Docket 16697.